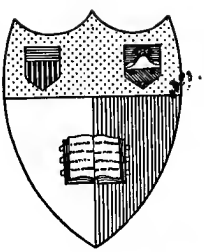
Rights and Duties of Neutrals

Daniel Chauncey Brewer



Rights and Duties of Neutrals

A Discussion of Principles and Practices

By

Daniel Chauncey Brewer

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PREFACE

THE majority of the following chapters were prepared for the *Army and Navy Journal* in the belief that the European war of 1914 was to force upon the attention of the United States issues that might readily lead to war, if the country was true to its traditions as a Neutral Power.

Of these issues the fundamental one, which in a sense involves all others, is of course—whether or not a peaceful commercial people shall have a place under the sun, or, to put it differently, whether nations that prefer the cultivation of commerce, art, and letters are to impose their will upon militant peoples or be ruled by these.

While the fact that the United States may be made a belligerent by breach of its neutrality, makes it suitable for officers, upon whom the nation depends in time of stress,

to discuss the rights and duties of neutrals, it is the subject of no less concern to the citizen who craves peace.

This is because, with the elimination of time and space, the nations have been drawn together in such a pell-mell way as to make strife between any two of them of grave import to the others; and because the subject of a great Power, which may become instantly involved in hostilities by a ministerial message that reflects nothing but self-respect, is apt to find himself involved in the swift (not slow) workings of God-driven mills.

A century ago, when the United States was painfully evolving the neutrality laws which found expression in the Statutes of 1818, little consideration was given to the rights and duties of neutrals because the arbitrary will of monarchs made war a political necessity. There were neutrals in name, and armed neutralities, but they were both too weak-kneed to be efficient.

The imagination of a magician could hardly

conceive of the change that a hundred years have made. To-day peoples, although some of them are not as yet sufficiently self-conscious, not kings, are the important factors, and the attention of the peoples is turned toward commerce not arms. It follows inexorably, if these conditions continue, that the sort of neutrality which seeks to separate itself from international quarrels, and which is the antithesis of belligerency, is on the eve of coming into its own.

Will it? Yes! If neutrals, in an epoch that is elemental because of the rush of unharnessed forces, and at a time when the flight of an army corps in distant battlefields may be the signal for changes terrific in their consequence, *prepare themselves*, by arming and unflinchingly standing by their rights, to compel peace as soldier kings have compelled war.

While the author believes and has not hesitated to point out that many customs incorporated in the law of nations are based on faulty logic, and should be eliminated

or modified, he is impressed by the fact that law to be of value must be authoritative. Great care has therefore been taken, in such reference to the rights and duties of neutrals as the scope of this book has permitted, to state what appears to be the positive law of nations, and to make it clear tha the latter must control until revision is made.

D. C. B.

Boston, *Dec., 1915.*

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The laws affecting neutrality for the next century are to be determined largely by the attitude of the United States during the present European conflict.

Its commercial prosperity as well as its tranquillity depends upon its present sagacity.

Rights and Duties of Neutrals

CHAPTER I

SOME GENERAL OBSERVATIONS

WHETHER the rights of man and of nation precede or follow his or its duties is a matter that philosophers must decide. For practical minds the rights of either are dependent upon a performance of duty. The citizen behind the bars may babble of rights, but his failure to perform his obligations has eliminated these, and the cabinet of a nation which has flagrantly disregarded primal law

cannot expect a hearing when it wishes to claim privileges.

This truth if borne in mind during any discussion of the rights and duties of neutrals will tend to logical thinking and consistent action. It will be found applicable to minor matters affecting such theories as those of contraband and blockade, as well as to broader principles and state policy.

Thus for an instance and specifically: The position of the United States is immensely stronger when it insists upon the rights of its individual citizens to manufacture and export arms (thus directly or indirectly aiding either belligerent) than it would be if as a nation it had not endeavored to observe every obligation which rests upon a neutral, by itself abstaining from such activities.

That any deviation from such a recognized standard, viz., the observance of international obligations by a state that claims an international right, in discussing matters which have to do with neutrality, is dangerous, scholars will generally agree. Meanwhile it

should be obvious to practical men that there is a paramount duty which can hardly be referred to as prescribed by ethics and international law, which cabinets should attend to as a matter of high policy and expediency before they are driven, as they sometimes are, to assert privileges which they have a right to claim.

This is the duty of preparedness, which a neutral nation, desirous of peace, owes to belligerents, to the sisterhood of civilized states, and to its own people.

(1) To belligerents because they may be led by the objector's apparent military weakness into disregarding rights that are being infringed.

(2) To the sisterhood of civilized states with whom in the matter of principles commonly recognized as sound each Power is sympathetically leagued for the preservation of right standards, whether or not such a compact follows lines suggested by the Cleveland Conference of May 12, 1915.

(3) To its own people who may at any

time insist upon ministerial action which is fraught with peril.

Primary as this rule of conduct for any great and self-respecting state should be, it is an extraordinary fact that the United States, whose interest and historic part in the annals of the last century is that of a neutral, has failed to appreciate the place preparedness plays in giving effect to proclamation and protest. This is the more anomalous because the nation has not been blind to its moral obligations, and because its population is essentially peace-loving, and ought to appreciate that when the word neutral is printed in the same capital letters as the word belligerent the world will be far nearer the peace millennium than it ever can become through opposing resolutions to bayonets.

Is it not time to change all this? Is it not for men who deal with things as they are in the light of what they desire, rather than academic theories, to see to it *now* that our national declarations of neutrality be rendered respectable by putting the nation's

reserve or latent power in such shape that it can be used if exigency requires?

Only by so doing, viz., performing a national duty as above described to sovereign states grouped as the embodiment of civilization and in their several capacities, can we secure the standing in court which is essential to us, if we mean to champion in our own interests and those of humanity the achievements won for neutrality in the past, and secure such conquests as will put neutral nations into the position in world conferences which belongs to them.

It is interesting to discuss the rules of war as they apply to neutrals; to define contraband; to argue the limitations of blockade, the new theories of "war zone," etc., but a commercial and peaceful nation should never forget that the international law of Hall and Oppenheim is law made largely under the influence of belligerent states in an abnormal, not normal, status, and that the industrial and social interests of neutrals require that positive law in all these matters should more

closely approximate to the natural law of Grotius and Phillimore, which is nothing other than economic and moral law.

This will never be brought about until neutral states, noncombatants, speaking with authority because they have performed their political and ethical obligations, play a major part in world councils.

CHAPTER II

NEUTRAL INFLUENCE AND FREEDOM OF THE SEAS

AFTER a neutral nation has safeguarded its own interests by preparing for any contingency, it finds that as a by-product to the achievement of national security it is possessed of influence that was not its before. This comes automatically with the creation of a military and naval force proportional to its needs.

Fitted in its own eyes for defense, it becomes from the belligerent's point of view a powerful medium for offense. In this nations have all the frailty and weakness of mortals. During the time that the neutral state was of no importance from a military point of view it was ignored. Now that an army and navy are features of its sov-

ereign life it is courted and treated with consideration.

It is curious that eminent pacificists whose hopes for the future rest upon the part assigned neutral states in world councils have given this fact so little weight.

Oppenheim, the text writer on international law, is a better observer. To him (vol. ii., page 359) the shaping up of such resources has been a most important factor in bringing about the rapid development in the laws of neutrality during the nineteenth century. If the distinguished professor is right, and ministries involved in war are careful not to offend a powerful neutral for fear of driving it into the opposite camp, the present opportunity for the United States to win lasting advantages, not only for itself as a neutral, but for all neutral states, is one that is historically without parallel.

This is especially so because trade and commerce, now the chief factor in community life, have waked a world public not only to a realization of the economic and unprevent-

able loss from war, but to the fact that states not involved in conflict are unnecessarily embarrassed by rules which are as illogical as they are archaic.

All that is now needed is strong and consistent leadership among the nations. With this furnished, the close of the present war will find belligerent peoples as anxious as neutrals to put the noncombatant in a position from which it may even hold the dogs of war themselves in check.

Unfortunately it is one thing to have an opportunity to do things of lasting value and another thing to act. Meantime no discussion of neutral rights and duties in this day is sufficient that does not contemplate both progress and reform.

In no department of international law is this more apparent than in that which intimately affects the United States and which has to do with rules and practices governing that great portion of the globe which is covered with water and is familiarly designated as the High Seas, whether the same

is understood to be the "unenclosed ocean without *fauces terræ*" of Judge Story, or is otherwise designated.

For reasons varying in weight from the ingenuously naïve and worthless to the respectable, both publicists and jurists have declared these to be free.

This is puzzling to the student who reads of belligerent aggression in the daily press; it must be irritating to naval officers who, themselves distinguished commentators on the law of nations, are informed regarding the facts.

For the high seas are not free in practice because of the right of search which is at present recognized as belonging to nations at war, and the theory is so obviously fiction that it is hardly worth while to read learned treatises which tell why the ocean is considered to be something else than it is.

No one will deny that here is occasion for *reform* as far as present practice is concerned, nor that *progress* is desirable even if it brings the arbiters of international affairs no further

than is required to make respectable the words—"Freedom of the Seas."

While serious objection will be urged to any change in prevailing custom by the representatives of nations that have championed the rule of the hour, there is a serious question if all such would not directly benefit by voluntarily curtailing their powers. Think of the trouble that a modification of the right of search would eliminate! Now in danger of being extended, its broad application long since brought peril to promoters who were too anxious to force neutral nations into partial servitude to notice its effect upon their own interests.

In 1812 it led England into conflict with America, and left a hard feeling toward the mother country, causing bad blood for over a century. It almost precipitated a war between Great Britain and the United States because of the Mason and Slidell incident at a time when the cause of the Union might have been wrecked thereby.

It has recently roused discontent in the

United States toward all the belligerents; and through Germany's inexplicable interpretation, extension, and application of Precedents must, if persisted in, bring it into conflict with a great nation that does not want to fight.

Notwithstanding these facts, we cannot expect belligerent nations of themselves to make any departure from past practices. Their immediate selfish interests will not permit it. The initiative must come from neutral states, which should be prepared to argue somewhat as follows:

"The older publicists, not hidebound by precedent, based the freedom of the seas upon the sentimental ground that they were equally convenient to all peoples as a medium for communication and therefore should be controlled by none; and upon the more satisfactory premises that no nation, however powerful, can exercise consistent dominion thereupon. States will find it for their advantage to bear in mind both points, but especially to recognize actual dominion as

the only criterion which justifies meddling with the concerns of a sister nation."

Politely submitted, matter of this sort ought to receive fair consideration, especially if backed by representations which indicate that the neutral nations are wearied of the part assigned them—that of the chestnut-pulling cat in the fable.

Perhaps the time has not come for such a leap forward. If not, then some approximation is to be sought for. Meantime is there not reason to believe that if a concert of the great Powers ever does decide to limit acts of sovereignty to the sphere in which the acting nation is in a position (whether by peaceful or war measure) to maintain consistent and constant dominion, then not only will a hundred tangles be avoided, but many of the new problems which arise in connection with the adaptation of old rules to new conditions will be automatically adjusted?

New conditions are caused by improvements made in artillery, ships of war,

fortresses, means of offense and defense. These are bound to bring about continuous and serious complications for neutrals unless positive international law is put on a sane basis.

CHAPTER III

THE DOCTRINE OF SEARCH

THE neutral state which realizes that it will never secure its rights upon the sea until the authority of belligerents is curtailed so as to correspond to the power they can respectively exert is apt to find self-restraint difficult in time of aggression. Nevertheless, it is better for prudential reasons for it to abide by law and custom in this as in other matters until it can secure a following among the nations.

By so doing—viz., itself waiting for international acceptance of the reform it never hesitates to urge—it

1. Wins the confidence of sister states; and

2. Puts itself in an impregnable position when it comes to insisting that no jot or tittle

of favorable existing law shall be abrogated—a thing which it is absolutely essential for it to do, unless it prefers to drift into a more untenable position than that which it is finding so unsatisfactory.

What is the legal status which properly frets the noncombatant commercial neutral, and which restricts its sovereignty? Briefly and baldly this: While neutrals and belligerents in time of war have authority over their respective lands and appurtenant waters as well as over their war-ships on the sea, the neutral has only a limited authority subject to belligerent visitation, search, and condemnation over its merchant fleet. That is, the neutral is expected to quietly suffer an indignity from a belligerent which a belligerent need suffer from none but the enemy against whose attacks it is armed.

That rules, operative on any sea in which the belligerent man-of-war sees fit to order a neutral trading craft to haul to and submit to such a search as pleases the boarding officer or his superior, are galling in the ex-

treme, are unreasonable and are unfair, must occur to anyone. What if there be a blockade of enemy ports or the trader carry contraband? Why should the belligerent interfere with a neutral ship in waters over which God Almighty alone holds dominion, and which may be off Kamtchatka, while the feud itself affects nations in the antipodes?

The question can have no very different answer from this. In the good old days (which seem to be with us again), when nations pursued war as a business, it pleased combative and ruling Powers that neutrals should be "cabined, cribbed, confined," and that their convenience, trade, and very life interests should be crumpled into such space as suited the militant states.

Inasmuch as Mars was beyond question wielding more influence at the council board of the gods in those days than Mercury, such policies took shape and form in laws and customs suited to the requirements of the warrior and inimical to the trader.

Unelastic, rigid, and set, these laws should

long since have been canceled, with the adoption of new and wise standards at the beginning of the nineteenth century, but although a few changes have been wrought in their character, we are only just coming to appreciate that the whole matter in mind when the doctrine of search was formulated must be taken up *de novo*, if international law is to correspond with the eternal verities or with the requirements of this generation.

When is this to be done? One person's surmise is probably as good as another's. Meantime, it will be a long step forward if neutrals can shortly modify the right of search so that it will be accorded to none except as a police measure in time of peace, outside of the waters so dominated by the country of the visiting war-ship as to make its authority supersede every other.

Pending this time let us hope that the present administration in Washington will see to it that nothing is lost which has been secured by American diplomacy in the past. At present its position is admirably dignified

and unassailable. All that remains for it when persuasively urged by foreign ministries to wink at unconscionable practices claimed to be extensions of existing law is to stand fast by such deliverances as that of Lord Stowell in the *Flad Oyen*, which can be found in *L. C. Rob. Adm. Rep.*, the occasion being the wrongful condemnation in a neutral port of a ship taken by the enemy French.

"In my opinion," says the learned Justice, "if it could be shown regarding mere speculative general principles, such a condemnation ought to be deemed sufficient, that would not be enough—more must be proved. It must be shown that it is conformable to the usage and practice of nations." And again, "A great part of the Law of Nations stands on no other foundation." "It is introduced indeed by general principles, but it travels with those general principles only to a certain extent, and if it stops there you are not at liberty to go further, and to say that mere general speculations would bear you out in a

further progress. Thus, for instance, on mere general principles it is lawful to destroy your enemy, and mere general principles make no great difference as to the manner by which this is to be effected, but the conventional law of mankind which is evidenced in their practice does make a distinction and allows some and prohibits other modes of destruction, and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes."

And again, with special reference to an American precedent in the day of our beginnings: "Wisely did the American Government defeat a similar attempt made on them at an earlier period of the war. They knew that to permit such an exercise of the rights of war within their cities would be to make their coasts a station of hostility."

And again, with direct bearing upon the

plea that has recently reached Washington from more than one belligerent: "The true mode of correcting the irregular practice of a nation is by protesting against it and by inducing that country to reform it. It is monstrous to suppose that because one country has been guilty of an irregularity every other country is let loose from the Law of Nations and is at liberty to assume as much as it thinks fit." "Institutions must conform to the text law and likewise to constant usage upon the matter."

Here are statements so sound and reasonable that eminent text writers quote them as articulating the sense of the nations.

It is improbable that neutral champions endeavoring to prevent any slipping away from such custom as is beneficent can find anything more applicable with which to meet the argument of an overreaching belligerent. They should be borne in mind in discussing the limitation of belligerent right to interfere with neutral shipping. They also have a direct bearing on such other matters touching

the rights of neutral citizens as have been forced upon public attention in the United States by the unfortunate incident of the *Lusitania*.

CHAPTER IV

THE *Lusitania* MATTER—NON-COMBATANTS ON MERCHANTMEN

NO better illustration can be given as to the right and the wrong course for a neutral to pursue at a moment when basic principles are under discussion, than that furnished by the resignation of Mr. Bryan from Mr. Wilson's Cabinet, June, 1915.

The question before the American people, acting not only for themselves but in the interests of the race, was—righteousness or peace—which!

Mr. Bryan said first peace, and perhaps righteousness if a court provided for along lines suggested by him so arranges. The President, with clear insight into the hearts of the American people, said—righteousness first, then let us hope, peace.

While any pacificist ought to see that in the eternal order of things Mr. Bryan's cast of peace conscientiously suggested could only be temporary at the best, it is dreadfully apparent that there is much confusion of thought.

In no other way can we explain the regret recently expressed in a certain part of the press, which affirmed that the United States by standing too vigorously for principle had lost the opportunity to lead a coalition of neutrals and be the peacemaker of Europe.

Because of this befogged condition of the public mind—consistently and persistently bewildered by the sociological group that anticipates the near approach of the millennium—it is desirable to clearly distinguish issues so that people may understand that the defense of neutral rights is one thing —the inauguration of world peace another.

This being done, men who look forward to the elimination of war can then produce such arguments as they please to convert to their way of thinking those of us who are incorrigi-

ble doubters and who believe that there are more important things in life than the attainment of a peaceful status; that there is nothing in the moral law or the teachings of the founder of Christianity that prefers dissimulation to straightforwardness, temporizing to decision, cowardice to intrepidity, or that there is no better way for this generation to assist in bettering international conditions than by endeavoring to secure for nations at peace (neutrals) recognized or unrecognized rights which belong to them, but which have heretofore been too frequently disregarded.

Meantime having eliminated such matter as is irrelevant, and having brought home to those who are looking for light the fact that, although a pacificist may be a neutral, it by no means follows that a neutral has to be a pacificist, those who look for progress through the broadening and extending of right legal principles can take up the matter affecting neutral rights which had the attention of President Wilson at the time of Mr. Bryan's resignation.

In doing this they will find that there is no question or doubt about the existing law of nations regarding the status of non-combatant individuals traveling upon other than war vessels.

Wrangle as the nations have pleased to about free goods, free ships, visit, search, and contraband, from the time of the Consolato del Mare to August, 1914, they have been in accord regarding human life on the high seas.

Thus there has grown up a body of positive laws, buttressed, fortified, and resting upon foundations which include the appreciation of natural law by medieval and modern conscience, the conclusive reasoning of the keenest intellects, and the formal assent of great sovereignties.

These affirm and insist that the non-combatant, whether neutral or enemy (but emphatically if neutral), is to be protected in every exigency which may arise in connection with the chase, overhauling, capture, and disposition of a merchant vessel, unless there be such resistance on the part of the carrying

ship, after full warning, as will justify the man-of-war in taking severe measures by way of self-defense, or in order to compel obedience to its demands. They cannot be construed otherwise than as requiring the captain of a cruiser or other national craft to use every resource at his command to avoid the endangering or destruction of people not themselves bearing arms or in the regular service of the enemy.

With the law thus defined and available by the use of responsible text-books written in any of the great modern languages, and with the facts which have to do with the matter in hand (viz., the loss of the *Lusitania*) collated and published, it will be surprising if such inquiries do not come to the following conclusions:

1. That this is a case where natural and positive law are one, the decisions of courts keeping pace with eternal principles of justice and equity, and therefore not to be lightly surrendered.

2. That if the rights thus accorded neutral

citizens be infringed, it is for the neutral state to take action, provided it is desirable, as seems to be generally believed, that neutrals shall take an increasing part in the shaping of the law of nations.

3. That any failure on the part of the neutral to insist upon observance of a law and custom which thus seriously affects it, or the substitution of such a scheme as was suggested by Mr. Bryan, would not only negative neutral influence for the time being and hereafter, but exalt belligerency and push it back upon the throne from which it has sent forth so many bloody decrees.

4. That at a time when the engines of destruction are becoming more frightful, any cowardice in the maintenance of recognized standards will permit the invasion of peaceful fields by a new cloud of terror.

In that case a plain duty will follow, to take issue with the recent Secretary of State, whose sincerity is not impugned, and to see to it

that the general public has the law and the facts clearly brought to its attention.

Our democracy cannot live without discussion of these vital things which have to do with its well being. Mr. Bryan himself in a late publication has come out as unequivocally endorsing a platform already assumed in these pages, viz., it is for neutrals, not belligerents, to dictate the international law of the future. Perhaps after all the arguments are in he may be brought to see that the way adopted by the President, at this time of national crisis, is profoundly in the interest of such world peace as is attainable.

However this may be, with right matter put properly before him, it seems as if any American of good understanding, whether conscience-dulled by modern vagaries or not, would say in the exigency caused by the unhappy loss of American lives by belligerent usurpation:

"There is but one choice, unless the nation is to forfeit rights and prove recalcitrant. This is—to demand a discontinuance of a

lawless practice, and if no attention be given its reasonable representations, to take such steps as may seem expedient to forcibly prevent a recurrence of the offense."

CHAPTER V

INCIDENTAL RULES AFFECTING RIGHTS OF NEUTRALS ON THE SEA

THE thirteenth convention of the second Hague Conference which concerns the rights and duties of neutral Powers in naval war contains the following:

"These rules should not, in principle, be altered in the course of the war by a neutral Power, except in a case where experience has shown the necessity for such change to protect the rights of that Power."

The stipulation should be borne in mind, otherwise a neutral taking advantage of an opportune moment to win that which has been wrongfully withheld, may put itself on a par with belligerents which are heedless in regard to international law when it suits their convenience.

Thus fortified in prudence one can safely take notice of certain belligerent practices on the high seas which are frequently overlooked in the consideration of major matters regarding search, the duty owed neutral travelers on merchantmen, contraband, and blockade.

Among the most important of these are: The practice of claiming that enemy goods continue enemy after sale to a neutral; the practice of treating vessels employed or leased by a belligerent for the purpose of victualling an enemy garrison or fleet, or the performance of kindred services, as lawful prize; the practice of seizing neutral goods in enemy ships when the same have what is briefly designated as enemy character.

Certain of these rules which favor the belligerent rather than the neutral are fair, others are not. Some are grounded on wrong premises—none have had the attention they deserve.

For the present, however, they should be the subject of keen analysis rather than of

action, because the law, whether it be equitable or otherwise, is fairly well defined, and nations at war may properly plead that the time is not convenient to suggest readjustment.

Bearing in mind, then, the fact that the discussion of certain matters with a view toward immediate correction is tabooed during the continuance of hostilities, we come to the consideration of aggressive belligerent acts which injure a neutral and for which there is insufficient warrant.

These may be classified under three heads, and briefly reviewed without considering the application of this grouping to a wider field than that which is represented by such neutral interests on the high seas as cannot be more conveniently treated elsewhere.

Class I. includes acts which give ample opportunity for protest, formal representation, and recommendation. This is because the law governing them is unsettled. Among these will be found cases which the conferees in the London Convention found it impossible

to dispose of, and in which the rules proffered were neither accepted nor rejected.

For instance, if neutral goods are found in the country of a belligerent at the opening of a war, under the French rule they take character according to the nationality of the owner, while by the English doctrine their status is determined by the locus.

Here are two radically different theories which may affect merchandise which is later shipped in enemy vessels.

So far the nations have been unable to get together on common ground. The whole matter is therefore open for neutral comment, and the exercise of neutral influence. So is it in the matter of enemy trade jealously guarded by a warring nation during the days when its commercial interests had first attention. There is a doctrine affirmed by some, denied by others, that inasmuch as the particular trade in question is vital to the belligerent, neutrals which see fit to enter into the same lose their character of impartiality and must suffer accordingly. Here again is

a fair field for the neutral. Nothing is so settled and defined as to preclude a sagacious Power from exercising its diplomacy in such a manner as will secure lasting results.

Further instance is hardly needed by way of illustration.

What we are to bear in mind is this, viz., that when there has been affirmation pro and con, whether by courts or international publicists of reputation, the neutral is accorded an opportunity to play a distinguished part in the shaping of international law.

Class II. comprehends acts which are without precedent, but which may themselves become precedents and endanger neutral rights in the future if permitted to pass unnoticed.

One does not have to go far for examples in days when the ingenuity of man is devising engines of war to prowl beneath the sea and in the firmament above. Such departures are of immense significance to belligerents as well as neutrals, and should, with a view to the future, be considered as carefully by them as by non-combatants.

It goes without saying, however, that the onus of seeing that novel war measures are in accord with natural law rests upon neutrals, and that they will be looked upon solely with regard to the military necessity of the hour by peoples who believe they are fighting for national existence. This is true even when it is suicidal for a belligerent to champion an erroneous practice.

Thus Germany by her use of the submarine, and with an eye to providing an offset to Great Britain's broadened theory of war zones, may be said to be thrusting a knife into her own vitals by teaching maritime nations how they may spread their rule at sea with smaller cost to themselves. Indeed, the Kaiser's Government has given the impression that it may go further and refuse the rational and necessary requests of the United States. A thing which, if actually done, will furnish Great Britain and her colonies, should she be victorious, with a precedent that may hereafter cause Germany's undoing.

This case, with which everyone is familiar in these days of stress, is only one of many that might be cited to show the inability of the belligerents to look after their ultimate interests under the pressure of war.

Neutral states must therefore expect to go on record in such manner as will protect not only their own rights, but those of humanity. In declining to do this they assume great responsibility. On the other hand if they perform that which must be regarded as a duty of the most primary sort, it will not be at all astonishing if they find themselves later supported—and stanchly too—by nations whose eyes are for the present holden that they cannot see.

Class III. comprises acts which justify action because they constitute a breach of the law which safeguards the neutral.

"Gentlemen may cry—Peace—Peace," but there can be no peace for humanity as long as the neutral allows such matters to pass unnoticed. Leagues to enforce peace may be admirable, but will ever prove insuf-

ficent without *moral stamina*, and there is no moral stamina when a strong neutral nation permits itself, its people, and human rights to be trodden under foot in defiance of established law.

CHAPTER VI

CONVOY

VERY little has been said in connection with the complications caused neutral shipping by British Orders in Council, about convoy. Why? Perhaps because the unusual blockade now being enforced against the central Powers of Europe comprehends the shutting off of enemy exports through neutral countries as well as imports, and makes such a provision embarrassing. For while it is possible that convoy might be arranged in the interest of merchant fleets sailing from neutral ports that are within the British zone, the matter would be a difficult one, and precedents are not available. However this may be, it cannot be denied that if the use of convoy (whether limited or not) can be made to modify any

phase of a trying situation, it should be introduced.

No neutral is going to take up arms against Great Britain until it is better satisfied that her theory of blockade is as indefensible as it is now believed to be. Meantime and during the exchange of diplomatic notes, it is conceivable that effort may properly and advantageously be made along the line of providing men-of-war as escorts, and otherwise, to eliminate causes of friction which are arising as a result of that blockade.

One of these causes is the transshipment of cargoes so that goods consigned by a neutral to a neutral reach a belligerent. The British ministry, with a color of right because of the law laid down by United States as well as British courts, and because the neutral countries next adjacent to Germany are piling up supplies until they have reached a bulk far beyond their domestic needs, is interfering with neutral intercourse. They plead that if they failed to do this, their blockade would be ineffective, and that the

surplusage of the merchandise delivered in Denmark, Holland, and Scandinavia has an enemy destination.

To their argument an exporting neutral may well reply: "We admit that you are not altogether without grounds for your suspicions; meantime your practice, aside from your inadmissible theories of blockade and contraband, constitutes a real grievance to a friendly Power. We therefore propose hereafter to send ships in the North Sea trade under convoy of war vessels, admitting none to the protected fleet except carriers whose trade is legitimate."

It is submitted that such a communication, properly followed up, even if it failed to bring a favorable reply, would leave his Britannic Majesty without further excuse for meddling with such trading between neutrals as is usual and proper. This is because even British statesmen, with their traditions of ocean overlordship, must recognize the fact that the guaranty of a neutral government cannot be gainsaid with-

out offense more serious than the difficulty they are trying to meet. They have already gone on record in the London Convention in favor of such practice—a mighty concession—and know that those who advocate it are thinking clearly and logically. Therefore even should they claim that the London Convention was inoperative, they could hardly by so doing escape the charge of being disingenuous and unfair.

Whether or not such a proposition on behalf of a neutral during the present war is feasible or desirable, depends upon facts which are not apparent to the unofficial observer. Meantime no discussion of neutral rights and duties ought to overlook reference to a custom that through neutral persistence promises to harden into law.

It was in 1653 that Sweden, in a similar predicament, because of war between the Netherlands and Great Britain, to that in which she now finds herself, urged that belligerents should waive rights of visitation in case of convoy, provided the commander

of the latter gave proper guaranties. Sweden was on safe ground although the peace of Westminster made it unnecessary to pursue the matter at that time. She was claiming something inherent in her as a sovereignty, viz., a right to officially administer and say the final word in regard to her own subjects and their belongings when on the high seas, and particularly when under the guns of a government ship. Whether or not she carried conviction to other cabinets at the time is doubtful, but it is a most interesting fact that the Netherlands, involved as a belligerent in 1653 but a neutral in 1756, was pushing the same contention a hundred years later. This indicates that the latter country was impressed. Indeed evidence of this is cumulative, for in 1781 the Netherlands, again fighting with Great Britain, made it a point to give convoy full belligerent recognition. By this time "convoy" was no longer a new proposition for the avoidance of ruthless visitation and search.

Prior to 1800, treaties recognizing the

authority of a warship convoying ordinary carriers had been signed by the United States and all of the great Powers now at war except Great Britain and Italy, and the practice was well under way toward receiving the standing in international law which belongs to it. Great Britain, however, was not complaisant, and her concessions were so grudgingly given as to discourage continental critics. Indeed, if it had not been for the Naval Conference at London in 1908–9, it is probable that she would still be in the position of a dissenter and obstructionist.

The struggle over the inviolability of a convoyed merchantman is synchronous with the slow emergence of neutrals as sovereignties having a part in the progress of the nations. As the law now stands, if we regard the unratified London Convention as most nearly summarizing the best thought of the hour, as well as reflecting the weight of authority in regard to maritime affairs, neutral vessels are immune when under convoy. Great Britain may undoubtedly claim that

she is not acquiescent because of the informality of the London agreement. This does not seem probable. If it were, neutral nations should refuse to relax a rule which has been sufficiently endorsed and which is based on a reasonable theory. The time has gone by when a neutral merchantman can be cut out with warrant from under the guns of a government ship. Let the belligerent commander harbor such suspicions as he may, there is no overruling the decision or report of the captain of the protecting war vessel except by referring the matter to the belligerent government concerned. This may take such action as it pleases. That is a secondary condition. The significant fact is that with the shifting of the issue from the high seas to the cabinet, unjustifiable usurpation of authority is discouraged and the rights of sovereignty vindicated.

Convoy was once a phrase that was not unfamiliar in maritime countries. It has fallen into disuse. Whether or not war conditions will bring it into the fore again

remains to be seen. Meanwhile reference to the custom is of value for two reasons:

(1) The reader can hardly select an international question of moment which better illustrates the manner in which neutral Powers have laboriously but successfully pushed their claims upon the attention of warring nations; (2) the claim that a convoying warship represents its government for the purpose of the moment is a formal demand for the recognition of sovereignty in the great spaces of the globe which are not subject to dominion. As such it suggests an era which may not be as distant as pessimists insist, when the neutral merchant vessel, outside home and belligerent waters alike, and still on the high seas, shall be regarded as a part of the country from which it sailed, and free, except for international police surveillance, to control its own movements.

Not so many years gone by Great Britain, as alleged mistress of the seas, did not hesitate to visit and search a neutral warship. She has made great concessions in the interest of

international law since those days. Whether or not she will make more in the near future depends both upon the wisdom and firmness of the United States and other neutral governments, and the consistency of the great countries with which she has joined battle.

CHAPTER VII

AVOIDANCE OF FALSE ISSUES—EXPERT SERVICE FOR THE PRESS

THE path of a neutral is difficult enough in these days of stress without adding to its perplexities. At the best, its duties are not easy to perform and its rights are hard to maintain. Notwithstanding this there are numberless journalists who insist upon stirring the neutral people of the United States with false as well as real issues.

No better instance can be cited than that of the *Armenian*. Whatever the official report may later show, the story which first reached the news centers contained no element that made the sinking of the freighter parallel the case of the *Lusitania*. This in no way discouraged the press. Even papers that are carefully edited informed their

readers that there was cause for apprehension in the fact that Germany was continuing the illegal use of the submarine as if no protest had been made. Yellow journals went further. To their mind the sinking of the *Armenian* took the place of a diplomatic note. It was Germany's way of saying, "We accept your implied challenge and join issue. Hereafter we shall continue to destroy merchant ships and non-combatants at our pleasure. If Americans happen to be involved, so much the worse for them."

People who are informed and who reason carefully from premise to conclusion were naturally not deceived.

According to the published account the *Armenian* was: (1) Carrying freight rather than passengers; (2) conveying mules direct to the British or allied armies; (3) under charter to the British Government, or in its direct service, whether the relation was that arising by requisition or contract; (4) probably officered by the British Government; (5) the meager returns at hand failed to state

whether the destroyed ship had attempted to escape or had offered resistance, and without such data the spirit of fair play required a suspension of judgment.

Thus the tale carried in itself elements which refuted the suggestions which editors were pleased to make, and the latter would have been harmless if the ordinary reader were trained to logical thinking. Unfortunately the ordinary reader is neither thoughtful nor logical, however estimable he or she may be in character or disposition. Nor is this in itself a reproach. Such is the speed and tension of modern life that much has to be taken for granted by those who are inclined to be meditative. How can it be otherwise with people who are without such tendency?

To a large part of the public therefore the suggestion that the killing of Americans on the *Armenian* was a bit of outrageous belligerent impudence outweighed the narrative itself. It was fortunate that the incident happened at a time when the country was

confident that the President and the Department of State were zealously guarding its interests in the very matter which was thus brought to its attention. Otherwise results might have been as serious as they are bound to be in the future, if more restraint and good sense is not shown by those who are the purveyors of news.

War is a terrific proposition, upsetting the economic affairs of neutrals as well as belligerents, and in direct proportion to its frightfulness. Although not directly engaged neutrals are thus of it. It follows that though there is a difference in degree, their affairs, whenever there is contact with warring nations, require the same nicety of attention as do those of the belligerent. If the latter have censors who are authorized to forbid the printing of matter which will endanger the state, why should not neutral governments, at least, see to it that their news agencies have the benefit of such trained official coöperation as will eliminate unjustifiable constructions that often accompany

war cables? Such an arrangement need not trammel the press nor curtail its freedom. That it already exists in some loose manner is evidenced by the familiar paragraph, "It is pointed out in administration circles" which occurs in metropolitan journals as well as country sheets on the morning following an episode of international importance.

The adoption of a few simple measures bringing a government expert in touch with the editor would not only make such paragraphs as hazard a guess at the law, authoritative, but would keep the public from that sort of erratic and unreasonable action which is fraught with peril.

We have seen how the story of the *Armenian* as first retailed gave no possible ground for the heavy leaded headings in the newspaper columns of the United States, and have noted how injudicious it is for patriotic journals to add to the real problems that their country is desirous of solving.

There is another lesson which is furnished by the incident to those who are not un-

willing to learn. This has to do with the animus of a neutral toward either belligerent in matters which have to do with the conduct of the war. States in conflict have undoubted rights in the matter of hostilities, and may reasonably expect that a neutral should recognize this in just the same manner that it exacts consideration for claims which more particularly concern it. Indeed a personified belligerent may properly argue—"Within a short time you who are now a neutral nation may be swept into the vortex of war. When that day comes you will need to have your hands free, and to take advantage of every fair means to protect your interests. For that reason you must be careful not to permit any prejudice, however slight, to call forth unjust criticism because a blow given in open battle affects your personal interests. Otherwise you will be gravely handicapped, first by rousing resentment on the part of a nation from which concession is desired, and second, by making it awkward for yourself when your time comes to buckle on the harness." It

has already been shown how necessary it is that a neutral which expects to maintain its rights should be careful to observe its obligations. Due consideration, and a few experiences like that adverted to, must bring home to us the further truth, that a nation which lacks poise and balance, that mistakes ordinary episodes for affronts, will foul its own nest and can never hope to serve humanity in the way of progress.

On the supposition that the *Armenian* was either in the direct pay of the British Admiralty, or, if not in such service, refused to respond to the hail of a war vessel, whether submarine or otherwise, there is not a word which can fairly be said in criticism of a succeeding attack, provided the recognized rules of war were not violated. Nor does the presence of American neutrals change the situation in the slightest. If the facts are otherwise, conclusions will also differ correspondingly. Meanwhile as a neutral country the United States should banish any hallucination as to the probable treatment that

belligerent men-of-war will accord supply ships which refuse to permit visitation or capture. They are not going to circle about the transgressing freighter, protesting through a speaking trumpet or otherwise until the vessel is safe in port. To the contrary, they are sure to deal vigorously as the occasion seems to require. It is probable that American citizens in general do not understand the clear distinction which exists between an ordinary freighter, especially when attached to the naval service, and a passenger steamship. It is also not unreasonable to suppose that they are ignorant of a warship's right to compel visitation.

Inasmuch as such lack of knowledge may involve them in catastrophes, effort should be made to provide for their instruction. Whether or not this is done, the nation should learn to accept the fortunes of those who enter any sort of enemy service, as something which is not a national concern.

CHAPTER VIII

BELLIGERENT USE OF NEUTRAL FLAGS

WHEN reference is made to neutral rights and privileges there is sure to be critical remark in regard to the use of neutral flags by belligerent merchantmen. Much of this is most regrettable because unreasonable. The keener the people of the United States are to preserve high standards of neutrality, the more careful should they be to eliminate from their program the requirement of anything that is patently impracticable.

In a democracy like the United States the inculcation of love and respect for the Stars and Stripes as the national standard binds a people, rapidly becoming heterogeneous, together. Too much emphasis cannot be given to its proper encouragement. Mean-

time it is probable that the enactment of a statute like the flag law of Massachusetts has an effect directly opposite to that which is intended. This hysterical bit of legislation fairly interpreted makes it a lawless act for a citizen to own an unabridged dictionary which contains a plate with the flags of all nations. The latter can have a British or German flag printed or engraved upon his letter heads, but must beware the use of any imprint of the American flag even though it is attached to an appeal to support the Federal Constitution. The instance is given as fairly illustrative of the harm that well-meaning folk can do when the end they seek is admirable.

As to the use of the American flag or any neutral flag by belligerents, and regarding the limit of sane criticism, doubtless such a use is improper and undesirable in the usual course of affairs. Under the law of nations and in accord with the eternal fitness of things such a custom can be and should be peremptorily forbidden. The Government of

Great Britain, against which censure is at present directed for misuse of neutral flags, is acquiescent in this. Thus Sir Robert Phillimore, vol. iii., p. 734, gives numerous references to the Admiralty reports to show that ships are deemed to belong to the country under whose flag they navigate, and Oppenheim, vol. i., p. 336, is unequivocal. "It is another universally recognized rule," he says, "that men-of-war of every state may seize and bring to a port of their own for punishment any foreign vessel sailing under the flag of such state without authority." Oppenheim also calls attention to the Merchant Shipping Act of 1894, which legislates to the same end. That act, however, goes further and may well be referred to here as conveniently introducing a notable exception to the general rule. This exception, apparently based upon the same international law which has heretofore recognized the use of neutral or enemy flags as a subterfuge by belligerent warships, is one that is directly applicable to the present issue affecting the use of the

American flag, and, if valid, should be given the greatest weight.

After stating that a ship shall be forfeited whose owners, without warrant, fly the British flag, the act continues: "Unless the assumption has been made for the purpose of escaping capture by an enemy or by a foreign ship of war in the exercise of some belligerent right." When it is remembered that the act in question dates back twenty years before the present war, that it was the authoritative expression of a nation which had won for itself the title "Mistress of the Seas," and that it may properly be construed as opposed to her own interests, we are inclined to accept it as an unbiased expression of the reasonable judgment of a people versed in Admiralty affairs and entitled to serious consideration as such. Whether or not this marked departure from custom is worthy of adoption as a rule of international law is another matter.

Sir Edward Grey under date of February 19, 1915, handed the United States Ambassador in London a note for transmission to the

United States in which he expressed himself as believing that the British practice was similar to that recognized by some other nations and "forbidden" by none. If he is right, there is certainly much to be said on the side of those who favor this usage, and distinct reasons why a neutral people, during a time of flux in which it will be difficult to secure any agreement on the part of belligerents, should be cautious in arrogating to themselves a right which may lead them into inextricable complications. This does not mean that they or their government should not make recommendations. It was manifestly proper for Washington under date of February 10, 1915, and after the German Admiralty declaration of February 4th, to suggest the "serious consequences" to American vessels that might follow the British Government's authorization of the use of neutral flags. It was also strictly correct for President Wilson's Administration to ask both Germany and Great Britain under date of February 20th "to require their respective

merchant vessels not to use neutral flags for the purpose of disguise, or *ruse de guerre.*"

Had this proposition been cordially received and acted upon, it would undoubtedly have been for the direct advantage of American shipping. Meantime while such representations are most fitting, it is exceedingly doubtful if a neutral government can judiciously push very far beyond the limit which is thus suggested because of the personal rather than national character of the offense.

Circumstances and ministerial correspondence since the opening of this latest, if not greatest, of all wars, have developed three phases of the question: (1) that which has to do with the several and specific cases in which misuse of the flag is alleged; (2) that which is suggested by the United States Government in its proposal that belligerents require their respective merchant vessels not to use neutral flags, etc.; (3) that which arises because of the claim that the British Government has instructed its merchant fleet to fly neutral flags in the zone patrolled

by German submarines. Of the three only one, and that the last, appears to be of a sufficiently objectionable character to warrant a breach of amicable relations.

It is quite conceivable that a neutral might, with some spirit, resent such orders as those which appear to have been given by Great Britain to ships of her great commercial fleet, *if the instructions were persisted in after protest.* This is because the belligerent aggression would be as positive and direct as if neutral territory were violated, and because a responsible government can be readily called to account for the wrong done.

The second phase, that which arises when a belligerent government fails to comply with a neutral request that it officially forbid the use of a neutral flag, may be deemed another matter.

Without the evidence of positive admiralty orders to commit a breach of international comity, a neutral is not justified in presuming that a belligerent government is responsible for the defaults of its subjects. The same

will be true, whether or not the aforesaid belligerent refuses to send out manifestoes which are in accord with the formally expressed wishes of the neutral. To argue that noncompliance is an unfriendly act, and to threaten reprisals as a consequence, would hardly accord with the dignity of the discomfited Power or serve its own interests. This being conceded, how impossible appears the task of satisfactorily meeting and discouraging such individual practices in using a neutral flag when imperiled as are grouped under the first phase of the question now so seriously debated.

Let us for the moment presume that the United States intends to discourage the improper use of its flag by belligerent merchantmen—that Great Britain not only acquiesces in the request of our State Department that obnoxious orders be withdrawn, but generously complies with the overtures of June 20th and forbids British merchantmen to use our flag under any circumstances—what then? Is there any reason why the

Mary Jane or any other craft belonging to his Britannic Majesty's marine should not, within twenty-four hours after Admiralty instructions of the sort referred to are issued, fly the American flag when in a position of deadly peril? Except for the near presence of an enemy submarine, she is alone on the sea. Neither a British nor American man-of-war is near enough to be cognizant of what is happening. If she escapes who shall say that the United States which gravely disapproves of the practice has failed in its duty to Germany or that Great Britain has offended the neutrality of the United States? Yet this is a fair instance of what happens when the American flag is hoisted by a belligerent merchantman. It is unfortunate and much to be deprecated, but if the *Mary Jane's* government is not officially responsible, and if a United States war vessel is not at hand to take due action, it is difficult to understand how anything can come from the naïve insistence of the public that the United States prevent the use of its flag.

The case in point selected for illustrative purposes only is that of a British ship. Exactly the same circumstance would arise if a German or Austrian acted in similar disregard of government orders. It is doubtful if a neutral has any other recourse when its rights are thus infringed than that which may be exacted by one of its own national vessels at the time. As for the enemy, why is it not sufficiently safeguarded by its belligerent rights of search and the machinery of the prize courts?

CHAPTER IX

TOUCHING NEUTRAL ATTITUDE TOWARD CERTAIN BELLIGERENT INNOVATIONS

NO feature of the war which has enveloped the Eastern Hemisphere in such an extraordinary fashion is so fraught with interest to the international lawyer as that which has to do with blockade, and incidentally with contraband. Much has been done in both fields that is plainly illegitimate and barbarous. Of such episodes little can be said except in severe condemnation. No color of right is behind them, and none but the disingenuous or prejudiced will excuse them. Meantime it is to be regretted that the critically disposed have not always been just in their animadversions. As has been emphatically suggested in these pages, new conditions not infrequently so alter the

status as to force a change of rules. If this were not done, the latter, instead of being useful and adapted to ameliorate a trying situation, would become not only difficult, but dangerous.

That the neutral should be keenly alive both to the breach of law and to attempted changes in practice is apparent to a superficial observer. Its immediate interests and its future policies are so frequently concerned that any other attitude would be censurable. At the same time the function of its government is quite opposite to that of a belligerent state. The latter, because of immediate needs which are vital, poses as a reformer, or, better, innovator. For the moment it is inclined to forget all else, even its duties to humanity, and concentrate upon the burning issue which has caused it to grapple with its adversary. In so doing it impatiently discards whatever threatens its integrity, and takes advantage of every means that contributes to its end (only restricting itself, if it appreciates the danger to itself of a relapse

into barbarism, to such novelties as are defensible).

To the neutral, on the other hand, the outlook is quite different. Affected by the war both in the matter of trade and in such friendly intercourse with sister states as is mutually beneficial, it is far from being privy to the issue; resembling the huckster who fears that his apple cart will be overturned during a street brawl which has come about without his connivance, and is apprehensive and alarmed.

As a consequence, the neutral is solicitous that the conventional law, with which both it and the belligerents are acquainted, and which has the sanction of an earlier generation, shall remain intact. This will give it a standard of action. It can imagine no other way of ordering its affairs and views a departure from the tried way with perplexity. To it *via trita* is indeed *via tuta*, and any other course means a thousand embarrassments.

With its interests thus widely divergent

from those of the belligerent, the neutral is bound to remember two things:

1. That while its protecting arm must be outstretched to safeguard all that is good in existing positive law;

2. It must acquire the habit of putting itself in the place of the nation at war, and seek to understand the difficulties it is trying to overcome—its motives—and the arguments by which it has convinced itself of the propriety of its action. A private counselor at law is bound in justice to his client to make careful study of the opponent's case. No less diligence should be expected from a state department which, in attempting to look after neutral rights, joins issue with the ministry of a belligerent.

In attempting to protect any invasion of existing positive law which has to do with blockade and contraband, the task of the neutral as in other questions affecting international relations, is clearly defined, if difficult. There are the decisions of national courts adjudicating matters of international

import—treaties, conventions, reports from the prize courts, and other sources from which to draw.

The endeavor to estimate the validity of novel belligerent intentions or practice will be found more perplexing. If they bear some approximation to natural law, as understood and already defined by philosophers and thinkers, there will be less trouble than otherwise. If they are founded on theories that have thus far proved too evasive or destructive to receive human recognition, they can only safely be rejected. In either case fair-minded neutrals will often be placed in a quandary. *At such times and in cases where positive law has failed to become coherent, or is altogether silent, the neutral may well set up standards which meet the test of an unprejudiced mind and apply them to the particular cases which come to its attention, not necessarily for the purpose of reaching a final conclusion, but in an endeavor to clear the air.* That there can be no impropriety in a neutral's so doing, especially when dis-

cussing contraband and blockade, is suggested by the action of a most eminent international lawyer, who assigns his treatment of this subject to that section of his authoritative book which treats upon the law of neutrality —"on account of the practical importance of blockade for the interests of neutrals."

Such a standard has already been suggested in these pages. It is that of *justifiable Dominion or Sovereignty*. Does the belligerent base its departure from accepted ways upon a defensible extension of that supreme authority which all states accorded each other within their own bounds in the days when the law of nations had its beginnings? Squaring with "the reason of the thing," the query is particularly adapted to the discussion of belligerent interference with neutral well-being through shutting off trade with a given coast or the seizure of supplies destined to enemy use.

While lexicographers define Dominion in different ways, the leading definitions make the word indicate—

"Sovereign lordship or supreme authority";
"The power of governing or controlling";
"The right of uncontrolled possession";
And, in law, "An act tantamount to an exercise of ownership."

Dominion sometimes exists by virtue of Right alone. Generally, however, it is exercised by Might. If this Might is without Right, and is consistent and constant, it must be conceived of as holding its dominant position by force. If, however, Might is coupled with Right, it presents an infinitely better ground for recognition, even if selfish interests block immediate indorsement. It is this sort of justifiable or vindicable Dominion which a neutral Power may well have in mind when drawing conclusions as to the decrees and performances of a belligerent.

Let us suppose that the belligerent under remonstrance has broken the positive law of nations; claims that the latter is obsolete; or alleges that it is above the law. What is the neutral to do? Its protests are without weight as far as any juridical system is

concerned. It is equally useless to appeal to the law of nature, to ethics or economics. If the belligerent makes humanity synonymous with natural law, it will claim that its aggressive acts are humane, because they conserve the interests of its people. If, on the contrary, it recognizes Might as one and the same with law, it will continue to work out its own ends, just as long as it is permitted so to do. In neither case, therefore, does the neutral get a hearing.

Thus thwarted, is there any better course for the neutral to follow than to apply the gauge it has selected and consider the "reason of the thing" in somewhat the following manner:

The offending belligerent claims Dominion, rightfully or wrongfully, in some specific matter pertaining to blockade or contraband. Two questions are presented:

1. Is the belligerent correct in its conclusions? Does it control (have dominion over) the mouth of a given harbor, a given coast, a given zone, a given area of sea in

which its war-ships happen to be operating in a manner that is without precedent? If it does not, it is acting without any authority, unless in certain contraband cases it may be that authority which comes from the law of nations which it refuses to obey.

2. If the belligerent does control or dominate the aforesaid section, does it do so by right or by sufficient color of right to enable it to defend its course on the ground of fair conquest or such occupation as is sometimes permitted by all nations in areas dominated by no one of them? If so, it deserves consideration. If it does not, it is without standing in court, and need only be consulted by the neutral as far as the latter's convenience permits. No matter how formal the pronunciamentoes of the belligerent, or vicious its engines of war, it is in no position to object to an aggressive neutral policy, and as long as human reason plays a potent part in human affairs will incur the present condemnation of mankind and occupy an unenviable place in world history.

CHAPTER X

A FURTHER WORD AS TO JUSTIFIABLE DOMINION

AS suggested in the last chapter the neutral may well rest back upon rational standards in times when positive law is in abeyance and natural law so diversely interpreted as to fail to be of use. In so doing it is like an unshackled person. On the one hand those bonds of positive international law which do not accord with reason and which were imposed upon it during the dark period of belligerent dictation are cast off. On the other—it is free as a sovereign state to follow the dictates of conscience as indorsed and supplemented by its best reasoning faculties. Such part of the positive law of nations as is based upon the eternal principles of natural law remains to it, whether recognized or not.

Meantime it is in a position with other neutrals to insist upon its cardinal rights.

The results ought to be fortunate in the extreme. Many have fallen into the habit (and among them learned professors) of saying that international law has been shattered by the existing turmoil, and in a sense they are correct, but if as a result a revised law of nations which more nearly accords with divine justice is to take the place of an arbitrary code drafted by war barons, the world will have cause to rejoice. It is only in this way that it can bring about conditions resembling those desired by the pacificist.

These preliminary observations have been made in the hope that such as are relevant may help in the examination of problems that are exceedingly difficult to solve. Heretofore we have had mostly to do with the open sea, on which the lawmakers have said all nations, except for the adoption of trammeling custom, are on a par. Now we are approaching the sphere of normal belligerent activities

and are to consider the right of a fighting nation to guard its own coast and possessions and to capture or control those of the enemy. In this field which embraces the doctrine of blockade, and what may be claimed to be a corollary of that doctrine, contraband of war, the belligerent looms large, and the neutral becomes a less compelling figure. A man may take himself very seriously when requiring his contentious neighbors to keep off his domain and to avoid blocking the avenues thereto. It is quite another matter for him to play the autocrat in an adjoining and quarrelsome bailiwick. Why? Presumably because in the one he possesses the attributes of lordship, which he lacks in the other. This lordship, whether it arise through possession which has been acquiesced in or by record title, is generally accepted among men, whether by intuition or an exercise of pure reason, as sufficient to justify a citizen's attitude in one case and to impugn it in the other.

Is there any reason why there should be other standards for nations? It is on the

presumption that there is not that the suggestion has already been made that a neutral which is impressed by the apparent exercise of efficient dominion by a belligerent, should heed such of the latter's warnings not to approach certain coasts or perform certain acts as are, to its mind, based upon rightful authority. In deciding upon the lawfulness of these commands the neutral will not be troubled when it comes to the consideration of belligerent acts of dominion within the latter's land boundaries; in such conquered territory as is securely held and administered by its armed forces; or on the ocean-going ships which rightfully fly its flag.

Thus far, as has been shown in discussing the rights of neutrals on the high seas, belligerent supremacy is conceded. Difficulties will arise, however, when the great waterways of the world are in question. The test is the same, but there has been such looseness in its exercise and such irrational adherence to a practice which no longer satisfies the principle that introduced it, that the air is

entirely befogged. A fog is frequently dispelled by a fresh westerly wind. What appears to be murky and unsatisfactory in the matter of controlled waters ought equally to disappear by a new application of the principle of absolute and justifiable dominion on the sea, which was bound in swaddling clothes in the days when muzzle-loading cannon defended harbor forts and wooden ships-of-war enforced respect for the state they represented.

With an absolute revolution in the matter of ships and guns the time has certainly come to dispense with the aforesaid swaddling clothes even if it takes a surgical operation, or else seek out a new principle. The moment is fortunate because the necessity of belligerents has led them to so neglect rules uniformly acknowledged by civilized states as to partly enfranchise neutrals. These latter are as a consequence freer to adapt their own policies so that the latter will square with any defensible regulations that war powers may enact.

In doing this, with full conviction that justifiable dominion is the only ground upon which any nation may arrogate to itself the sovereignty of waters about its own or enemy coasts, we may perhaps expect that one broad, if arbitrary, exception will be made to any nation's claim—that is, the right of unimpeded passage by neutrals in their intercourse with each other through any such broad spaces of sea as are the avenues of world trade, and may be fairly viewed as part of the great sheet of water which encircles the globe, even though such spaces are subject to control. When this is allowed why should not the neutral, not as a neutral but as a sovereign state, affirm one of two things: (1) That inasmuch as it is in a position with its ships and fortresses to absolutely command much larger spaces of water about its coast-line than was practicable a generation ago, it proposes so to do; (2) that it is prepared in an international convention to waive such rights as unquestionably belong to it and accept an arbitrary sphere of control which

shall also define and limit the sovereignty of all states.

If it chooses the former course, it is bound to accord to others what it claims for itself, and will at once find its relations to belligerents, both in the matter of blockade and authoritative zone, so modified and changed as to bear no resemblance to what they were under the positive law of nations as understood by the members of the Hague Conferences. If it chooses the latter, pending such time as will again bring the nations in convention, it will either have to champion and perhaps fight for part of a code that Powers in the stress of events claim to be outworn and ineffective, or submit to various and trying interim experiences.

Are there fallacies in these suggestions? It would not be surprising if there were. When one endeavors to think constructively, elements which should have attention frequently escape notice. Meanwhile let us hope that a frank discussion of the limitations of state sovereignty may prove at least

helpful to a better understanding of questions appertaining to blockade and later to contraband.

Whatever the shortcomings of the present argument, it may be confidently affirmed that, except on the ground of common consent, present-day belligerents cannot long be held down to an observance of the rules of blockade as defined and practiced since the American Civil War, nor neutrals be required to submit to certain features in the existing law of contraband.

CHAPTER XI

BLOCKADE

PHILLIMORE states—volume iii., page 473—that "Among the rights of belligerents there is none more clear and incontrovertible, or more just and necessary in the application, than the one which gives rise to the right of blockade."

While that eminent lawyer in arriving at this conclusion unquestionably places great weight upon precedents and the opinions of courts and commentators, quoting Grotius, Bynkershoeck, and Vattel at length, and directly stating that there is no subject of maritime or international law upon which jurists of all nations are so unanimous and precise in their opinions as upon the right and law of blockade, he yet does not hesitate to affirm—volume iii., page 474—"that a dec-

laration of blockade is a high act of sovereign power."

There is no doubt that a neutral, whether or not it choose to consider itself as released from all obligations to observe the positive law of nations because of the derelictions of others, should regard all declarations of blockade as such, viz., high acts of sovereign power. It will then, if the acts are warrantable (within the rightful province of the belligerent), give them the same consideration that it accords, as a matter of course, to all the legitimate performances of a sovereign state. Thus concluding and thus acting by the exercise of reasoning faculties, and without necessary reference to precedent, it recognizes the fact—

1. That when other states are unable to peaceably settle difficulties arising between themselves they will go to war.

2. That as a consequence of war each of the belligerents will endeavor to impose its sovereignty upon such possessions of the other as it may control.

3. That when such enemy sovereignty is extended over conquered enemy territory or over the waters which wash enemy coast line or flood enemy harbors, it is a valid exercise of dominion to which the neutral as a neutral must show the same consideration as it requires for itself in the field of its own sovereignty.

This discussion regarding the righteousness or rightfulness of blockade, and the controlling characteristic which makes it authoritative to neutrals, whether they are released from precedent or not, naturally follows certain propositions already advanced for the use of a neutral Power whose rights under the law of nations have been ignored. At the same time it properly antecedes a more formal consideration of a subject which never was of greater importance than at present.

Referring now to the text writers, we find that blockade, which as a belligerent right is hardly second to belligerency itself, is defined by Oppenheim (the latest authority),

in the second edition of his valuable treatise, as "the blocking by men-of-war *of the approach to the enemy coast or a part of it* for the purpose of preventing ingress or egress of vessels of all nations." It will be noted that Oppenheim's book was published by Longmans, Green and Company in London in 1912, three years prior to the British Orders in Council which have caused some Englishmen as well as many neutrals much apprehension, and that it fairly sets out the consensus of authority up to the date of its appearance. In so doing it specifically and necessarily limits blockade to the investment of "enemy coast or a part of it," and is in line with Article I. of the Declaration of London, "Le blocus doit être limité aux ports et aux côtes de l'ennemi ou occupés par lui," which, ratified or unratified, has the standing which James Brown Scott gives to those clauses of the Hague Conference to which nations attached reservations. Dr. Scott says—see Introduction to *The Hague Conventions and Declarations*, published by the Carnegie

Endowment—"Failure to ratify is merely to be regarded as the rejection of a codified text, not as the rejection of principles of international law, which no Power can reject without excluding itself from the society of nations."

If the definition is a correct one the rulings of the Conference are authoritative, and we are right in our claims set out in the last paper, that any act of dominion by a belligerent on the high seas nearly adjacent to its coast must by the reason of the thing yield to the prior and controlling right which lies in the body of neutral states it excludes, to traffic with each other; and the act of the British Government, as far as it is interpreted as authorizing the blockade of neutral ports, (however amicable its intention,) must have been taken without serious expectation that it could be defended if challenged, and cannot be cited as a valid extension of any existing principle.

This reference is made to a special act of Great Britain, which is claimed to be nothing more than an adaptation of an existing and

reasonable rule to present conditions, in order to emphasize the necessity of a neutral's discouraging all such innovations if it wishes to avoid pitfalls that may be its undoing.

Bearing in mind, then, the necessity of excluding any unnatural interpretations of the given definition of blockade, and especially such as directly contradict its obvious meaning, the student can advantageously review certain aspects of the doctrine.

The Declaration of London of 1909 summarized conclusions generally admitted at the time of that conference in twenty-one articles. These include the definition already given and statements which are suggested by the following recapitulation:

Art. 2—Blockade must be effective.

Art. 3—It is a question of fact whether or not blockade is effective.

Art. 4—Blockade is not raised by the temporary dispersion of a fleet owing to stress of weather.

Art. 5—Blockade must be impartially exercised.

Arts. 6, 7—Exception ought to be and is made in the case of neutral ships-of-war and vessels in distress.

Arts. 8, 9, 10, 11, 12, 13, 16—To be obligatory a blockade should be declared and notified by a competent authority, fixing the date of commencement and indicating the geographical limits. If the required formalities are not observed in the original declaration a new announcement must follow, and in any case neutral ships in port at the time of notification are to have special consideration.

All neutral Powers, as well as the local authorities, must be notified by the blockading Power or the commander of its squadron.

There must be distinct announcement in case blockade is extended or renewed after suspension.

Special treatment is to be accorded ships not informed of the existing blockade, and neutrals must be notified that a blockade is discontinued in case it is voluntarily relinquished.

Arts. 14, 15, 17, 19, 20, 21—A neutral ship with actual or presumed notice of blockade may be seized and confiscated.

Right of seizure should be limited to the field occupied by the blockading squadron. Exceptions to the right of seizure favor the neutral vessel in case the latter passes through a blockading squadron on its way to an unblockaded port, and favor the blockading ship in cases where the chase of an outward bound neutral ship is continuous.

Art. 18—A blockading force must not bar access to a neutral port.

It will be noticed that these articles, prepared after exhaustive study, naturally divide themselves under comparatively few headings, which call attention to the requirements of blockade, such as effectiveness, limit in time and space, notice and declaration, the penalty of breaking blockade, and belligerent rights and duties prior to and in connection with the imposition of the same; the attitude of a blockading squadron toward neutral countries and vessels not directly chargeable with

breaking into an enemy port through the cordon it has established.

These probably comprehend all ordinary phases of the subject, and if given separate and sufficient attention should advise a neutral of its rights and duties in the premises.

CHAPTER XII

EFFECTIVENESS AS A REQUISITE OF BLOCKADE

BLOCKADE in order to hold neutrals must be effective. That is what the savants have agreed since the Paris Convention in 1856. That is what the Declaration of London affirmed in 1909.

Prior to the former date the great nations, in spite of the statements of the Armed Neutralities, seemed obsessed with the idea that belligerency was the normal condition of states and that international law reflected the wishes of belligerents. For this reason the so-called "paper blockade," which interfered with neutral trade, by proclamation received consideration until the nineteenth century. It was doubtless in the discussions which followed neutral endeavor to articulate the conviction that a belligerent must justify

its aggressive action in interfering with the former's commerce that the word effective was chosen to characterize the sort of blockade that might properly receive neutral recognition.

To the impartial mind the selection reflects timidity. At all events it was a blunder. Effectiveness ought certainly to be required of any blockade that can be defended, but effectiveness does not of itself vindicate the blockade.

A robber state may seize and effectively hold the property of an abutting nation just as a bandit chief may effectively hold the personal property he has wrenched from the defenseless, or bar the use of a highway to an intimidated neighbor. In neither case does the effectiveness of the act excuse or explain it.

Since the word effective, coined long since, is clearly insufficient and loses its usefulness at a time when belligerents are making their own rules, it is proper for the neutral, which believes that blockade like other belligerent

acts is only to be recognized as an act of justifiable dominion, to substitute the latter phrase for the word effective in determining its obligations in the matter of a belligerent effort to shut off its trade with enemy ports. In doing this it will not eliminate the idea of effectiveness—this is included in the larger designation and is an element without which any endeavor to control enemy coasts must prove futile.

"A blockade *de facto* should be effected by stationing a number of ships and forming as it were a circumvallation round the mouth of the prohibited port, where, if the arch fails in any one part, the blockade fails altogether." (The *Arthur*—1 Dodson, p. 423.) That is the way a much-quoted authority expressed the general idea of an effective blockade in the days when ships-of-war were but feeble instruments of the execution of a nation's will when compared with the units which compose a modern fleet. Old-fashioned as the rule now appears to be in the face of later practice, it is yet exceedingly suggestive, as indicating

the closeness of the watch which many have declared that a blockading squadron is expected to keep over the coast which it patrols.

That there is another and more liberal point of view is apparent to all who are informed of the blockading of 2500 miles of Confederate coast during the American Civil War by four hundred ships of all sorts. Impossible as it was for the Union navies to shut out all blockade runners, the cordon which they maintained was sufficiently masterful to make an attempt to pass through exceedingly hazardous. Neutral states therefore recognized the act of the Federal Government as entitled to the same degree of consideration that the public in a great city accords the police lines that are thrown about a given municipal district which is the scene of a conflagration or tumult. They were conscious that individual ships might safely slip through the line of patrolling gunboats—indeed they frequently did so—just as single citizens pass the limits from which they are

refused admittance without having their heads broken in the attempt, but the risk was sufficient to make the venture imprudent, and it being within the province of a belligerent to impose such restriction as had been formally proclaimed, they assented to the blockade as authoritative.

Differing as these two theories do regarding what is required to make a blockade effective, it does not seem as if there were any sufficient antagonism to explain such a conflict among publicists, as is apparent. Underlying each is the same vital principle which, crudely expressed in the books, makes it necessary that a belligerent in imposing a burden upon the commercial world shall make such continuous demonstration of its power to enforce its decrees as will command attention.

This is happily recognized in Article 3 of the Declaration of London by the positive affirmation—"La question de savoir si le blocus est effectif est une question de fait." Would that every statement of an international convention were as clear and incisive,

and that all the rules which have been enacted by nations in conference had been as flexible and adapted to all periods! If it is to stand hereafter (and it must if reason is to be the arbiter), it will be found equally adaptable to a period in which a nation's military resources upon, above, and below the surface of the sea far transcend those now existent, as it is to present problems. Already it is serving the good purpose, quite irrespective of its standing as part of an unratified declaration, of bringing clearly to men's minds the fact that precedents which refer to the agencies used by a belligerent to enforce its will are only valuable when coupled with a clear appreciation of the limitations of the epoch to which they refer.

Never did the nations stand in greater need of such declaratory and cautioning words as those drafted by their emissaries as the expression of world opinion just prior to the greatest of wars. To states in arms they carry a positive message, which says in effect: "On the hypothesis that you are

within your belligerent rights, do not fail to remember that although your ships with auxiliary agencies can command much wider areas off enemy coasts than the vessels of former years:

"1. You are pitted against enemy machinery in the shape of fortress guns, mines, vessels, and all manner of defensive inventions.

"2. As your fleets push their outer lines into ever widening zones of sea, they must expect to contest with the elements for a certain sovereignty which nature has not yet conceded to man.

"3. That the swift vessels of commercial nations not involved as direct partisans in the war are not to be as easily policed as the sailing craft of earlier times.

"4. And that nothing less than absolute ability to control these forces as a matter of fact will be accepted by the neutral world as an effective blockade."

To neutral Powers the message is brief but crammed with significance: "If a belliger-

ent acting *within its rights* is, as a matter of fact, *dominating* waters off an enemy coast, your shipping must avoid such seas, otherwise it will be confiscated."

CHAPTER XIII

SOME PRELIMINARY REMARKS REGARDING RECENT INTERFERENCE WITH NEUTRAL TRADE

THOSE who have thought of the science of public international law as something academic and impracticable must have had a sharp awakening in the last twelve months. To their mind municipal law had an honorable standing because its rules and requirements must be obeyed, but the law of nations could have nothing to do—and would have nothing to do—with their personal welfare.

If millions of such have not been disabused of their opinions since August, 1914, it is because they are without an appreciation of the great events which are affecting all civilized peoples. For crisis has followed crisis, and state papers affecting races have

been interchanged with unparalleled activity —each several issue in turn being shaped in accordance with international law or judged by its precepts. Among these none has been weighted with more significance for the population of great states than those which have had to do with blockade and certain belligerent rights connected therewith.

The average citizen has long understood that he frequently suffers and is imposed upon because of a failure of the police and the courts to vindicate his rights.

Now if we are to believe Imperial Chancellors, every individual in Germany, Austria-Hungary, and Great Britain is to be seriously affected because of enemy policies which are claimed to be breaches of the law of blockade, breaches which can only be prevented by force of arms and such a crystallization of neutral opinion or affirmative action as will command the attention of the aggressor.

Thus international law has become a matter of very serious import to men and women in Europe. That it is already such

to the citizen of the United States is apparent to all that are conversant with the communications which have passed between Washington and European chancelleries, and who have heeded the manner in which preparedness for action is being discussed.

It is this fact, viz., the concern of the individual in the underlying principles of law, whether codified or not, as it affects the nations, that makes it wise, first to review existing practice and discuss broad grounds of action when practice has been negatived or is lacking; then to acquaint ourselves with actual problems and come to such conclusions as reason shall dictate. Following such a course in reference to the doctrine of blockade, we have noted the fact that blockade is an act of dominion over coasts and in waters where a belligerent exercises lordship as by conquest; recapitulated the rules approved by the Declaration of London; marked the bounds by which belligerent activities are limited, and called attention to the fact that new conditions may vary

practice without changing principles. We are therefore prepared to take up and impartially comment upon the present status in the North Sea, the English Channel, and the waters surrounding the British Isles as it affects the United States and all neutrals. That it is extraordinary, even when compared with the startling war measures that have not infrequently stirred the people of earlier generations, will not be gainsaid, and there is great occasion for contentment because President Wilson's Government has handled itself so admirably, stating and restating those parts of the law of nations which are applicable thereto with accuracy, and refusing to concede the propriety or lawfulness of acts based upon interested interpretation or so-called extensions of familiar principles and necessity.

To understand the situation and get all the facts in mind which have any connection therewith it is necessary to recall:

1. The earlier correspondence of the war period which has passed between belligerent

governments and the State Department of the United States;

2. The direct proclamations of belligerent Powers regarding war areas; and

3. Further communications which have been exchanged in an endeavor to clarify or justify official action or position.

Of intense interest were the notes interchanged in regard to the Declaration of London which cover the dates between August 6 and October 24, 1914. These included the inquiry from Washington as to whether the conclusions of the Naval Conference were to be regarded as applicable to the opening conflict and the suggestion that inter-agreement might prevent grave misunderstandings, the replies from belligerent states, and the final withdrawal by the American Government of its overtures. It will be remembered that the Central Powers indicated willingness to conform to the Declaration of 1909, provided the enemy did likewise, and the responses from England and France were acceptances subject to

certain modifications and limitations; also that the returns were such as not only made it appear unwise to the United States to go further in the matter, but were sufficiently defined to indicate that the Allies—for Russia followed the action of Great Britain and France—felt that the ratification of the Declaration would be an embarrassment to them. Indeed, in the memorandum attached to the British Government's communications to the American Ambassador in London are direct intimations that Great Britain believed the enemy would probably receive vast quantities of supplies through such neutral ports as Rotterdam, and that adherence to the defined laws of the Declaration regarding blockade, conditional contraband, and ultimate destination of contraband would work disadvantageously to the Allies; a fact that appears to have been so patent to Germany and Austria-Hungary as to have made those governments careless in regard to the indorsement of the rules referred to, provided they were adopted by the enemy.

But little time interposed between the withdrawal of the United States of its suggestions regarding the Declaration of London and official protest by this government against restraints upon its commerce. The final letter touching the Declaration was dated October 24, 1914. On the 26th of the following December the Department of State filed a formal protest against British treatment of cargoes bound to neutral ports, and received a polite reply which, with the supplementary letter that followed, reflected the anxiety with which the Allies viewed the manner in which supplies (that might under ordinary circumstances have been legitimately cut off by naval Powers of such importance as Great Britain and its ally, France, by extending the list of contraband or by a blockade of enemy coast) were reaching the enemy through the ports of countries whose trade in various commodities had increased inordinately. These communications, taken in connection with the detention of various vessels flying the United

States flag, were sufficient to indicate that the Allies considered themselves justified in so construing the laws affecting "continuous voyage" and "search" as to permit them to subject neutrals to all the inconveniences of a blockade more far-reaching and injurious than had ever been attempted.

They were followed in due course by the German proclamation of February 4, 1915, declaring the waters surrounding Great Britain and Ireland, including the whole English Channel, to be a war zone, and by a memorial of the Imperial German Government which affirmed that just as England had decreed "the whole North Sea between Scotland and Norway to be comprised within the seat of war," so Germany by its proclamations declares "that it will prevent by all military means at its disposal all navigation by the enemy in those waters," and warns neutral Powers "to recommend to their own vessels to steer clear of these waters." Here are two attempts to impose a virtual blockade, neither of which has any standing in

positive international law, however interpreted, and neither of which at all appeals to the impartial mind as having any resemblance to the controlling principles of justice and equity. The latter can be abruptly dismissed because of its frank lawlessness. The earlier, which has now assumed definite form, requires more particular attention.

CHAPTER XIV

THE ORDER IN COUNCIL OF MARCH, 1915

THE attention of the reader has been called to the German Declaration of February 4, 1915, which initiated the so-called submarine blockade, and to certain British correspondence and acts anterior thereto. Before dismissing the action of the Kaiser's Government, which the latter appears to have based upon a certain necessity induced by the activities of the British fleet, and the "toleration" of neutrals, it should be said:

1. That no dereliction of a belligerent or neutral could justify the extraordinary features which threatened to make the submarine, *as used*, a frightful and irrational innovation to the terrors of war.

2. That aside from other characteristics

required to make blockade legitimate, the German submarine fleet, far from effectively dominating the waters in which the Imperial Government has pushed its retaliating and military measures against England, which would have been requisite to secure the attention of neutrals, have done little more than maintain a precarious footing.

3. That neutrals were and are under no obligation to pay any attention to the German Admiralty's proclamation of February 4th, because no principle of law outside that of blockade appears to exist or has been advanced in modern times by which a belligerent can close uncontrolled sections of the high seas to neutral vessels without raising a *casus belli*.

With this brief discussion of the extraordinary campaign which Germany is conducting in seas through which all neutrals have a right of way, we turn to the British Orders in Council, transmitted by the American Ambassador March 15, 1915, after a preliminary notice from Sir Cecil Spring

Rice dated March 1st. It will be remembered that a simultaneous decree was issued by the French Ministry. Obviously the action taken by the Allies is the direct result of the natural endeavor of these belligerents to meet a situation which was most exasperating. With the opening of the war they had found Germany to be reasonably independent of the commerce between her own and American ports. Advantageously located for war exigencies, she could practically lock up her own harbors and receive such imports as were needed through adjacent neutral countries. Such action negatived much of the offensive value of Great Britain's armored fleets, and could not be permitted. Plans were therefore devised by the adaptation of familiar principles to shut off all merchandise reaching Germany and Austria-Hungary through neutral intermediaries. These comprehended:

1. A pushing of the doctrine of contraband to such a limit as would make it possible to detain contraband whether bound to enemy

ports or consigned to neutrals who might easily transship it.

2. The seizure of neutral ships within given waters and the taking of such craft to suitable allied harbors for rigid investigation, on the ground that they might have contraband concealed.

It is not surprising that such measures shortly after they were adopted did much to discourage the greater part of the trade which Germany had built up. With every neutral vessel, wherever bound, under the suspicion of carrying a consignment for the enemy, and of concealing contraband so cleverly as to require a more particular search than can be effected outside of a suitable anchorage, a belligerent fleet can work havoc both with the enemy and *neutrals*.

It will be recalled that when the United States took exception it was politely pointed out by Great Britain that precedents of the Supreme Court justified the continuous voyage theory; and that ships had become so large that (if, for instance, they carried

contraband copper concealed in cotton bales) they could not safely be examined in deep water—arguments which were not accepted as convincing. As for the enemy, which appeared to have been badly crippled by the adoption of such measures, something positive seemed necessary, and the submarine terror was inaugurated, only to bring in retaliation the definite Order in Council of March 15th, already referred to. This purports to be a blockade, but is not, as was immediately noted by the State Department of the United States. Referring to Germany, the British declaration recites: "Her opponents therefore are driven to frame retaliatory measures in order in their turn to prevent commodities of any kind from reaching or leaving Germany"; and adds, after noting that a humane method of enforcement will be adopted, "It is not intended to confiscate such vessels or cargoes unless they would otherwise be liable to condemnation." To which, as part of a longer note, the United States properly replied March 5th: "While

it appears that the intention is to interfere with and take into custody all ships, both outgoing and incoming, trading with Germany, which is in effect a blockade of German ports, the rule of blockade, that a ship attempting to enter or leave a German port regardless of the character of its cargo may be condemned, is not asserted. The language of the declaration is 'the British and French governments will, therefore, hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownerships, or origin. It is not intended to confiscate such vessels or cargoes unless they would otherwise be liable to condemnation.' The first sentence claims a right pertaining only to a state of blockade. The last sentence proposes a treatment of ships and cargoes as if no blockade existed. The two together present a proposed course of action previously unknown to international law."

This answer set out those characteristics of the British proclamation which made it

fall short of what neutral nations might properly expect in a declaration of blockade. Other objections were summarized by the United States Government under date of March 30, 1915, in a communication which pointed out the fact that neutral sovereignty could not surrender to belligerents unlimited rights over neutral commerce within the whole European area; insisted that neutral sovereignty with certain exceptions suffered no diminution in time of war; and complained that the limitations placed upon neutral shipping by the Orders in Council were "a distinct invasion of sovereign rights."

It is exceedingly fortunate that a great neutral Power has taken such high ground. Meantime neutrals may rest assured that if the issues now joined are ever tried out the facts will show that neutral Powers have never resigned their rights in certain waters now in the so-called war zone, which are necessary to their trade; that certain seas comprehended in the British Orders in Council are absolutely outside of the control

of the allied fleets; that certain other waters in which the Allies are maintaining and can maintain great fleets are not subject to control because of physical conditions which nations cannot dominate.

CHAPTER XV

SIR EDWARD GREY'S LETTER DEFENDING THE BRITISH GOVERNMENT'S "ORDER IN COUNCIL" OF MARCH, 1915

THE close examination of an opponent's argument is always salutary. Either our eyes are opened to the truth, or we are sustained in our position by the realization that the other side is resting its case upon fallacies and inaccuracies.

To an unprejudiced citizen of the United States the British Order in Council of March, 1915, inaugurated a policy which is as untenable as it is hurtful to neutrals, and it can make no difference that the same has been adopted with a sincere desire to avoid harming non-belligerents as such. We shall be surprised if the letter of Sir Edward Grey dated July 23d does not confirm him in his

opinion. The official communication referred to was transmitted by the American Ambassador the day after it was dated. Among other points to sustain his contention Sir Edward Grey, whose high quality of statesmanship is generally acknowledged, makes the following claims and assertions that may be reviewed to advantage. Carefully as these grounds for British action are stated, it is impossible that anyone will be impressed thereby. They do not appeal to reason, and one who reads a copy of the original text cannot readily grant more than that Earl Grey has honestly noted everything, whether convincing or not, that can be said in support of what the nation he represents has undertaken as a matter of high state policy.

1. *Necessity.*

"I read the communication from your Excellency's Government," says the Foreign Minister's note, "not as questioning the necessity of our taking all the steps open to us to cripple the enemy's trade, but as

directed solely to the question of the legitimacy of particular measures." While this appears to be an endeavor to convince oneself that necessity is recognized in the United States as excusing an act not otherwise permitted, it is a naïve admission that there are those who would limit a nation's use of force to operations which are legal. Of course there are, and among them the Allies themselves! If it were otherwise, aggressions of which they rightly complain would have no check, and not only would enemy nations repeat violations of law which have been criticized, but neutrals themselves, under the same plea, would put forward *necessity* as an excuse for unneutral acts.

It is long since nations found that states at issue were each disposed to plead necessity as an excuse for deeds that were open to emphatic objection. They have therefore preferred to give less weight to the cry of necessity than to arguments which are advanced to prove that an adopted policy is legitimate.

2. *Right of a belligerent to blockade neutral ports if no other way presents itself to reach the enemy.*

This proposition, according to the British minister, rests back upon the rule admitted by the United States—that a belligerent has a right to blockade an enemy port; which to the mind of the apologist is nothing more nor less than "cutting off the sea borne exports and imports of the enemy." The argument runs somewhat like this, viz.: If you cannot get at the enemy port to blockade it, and find that the latter is receiving supplies through neutral harbors, then you are at liberty to blockade the aforesaid neutral harbors because you have a right to cut off "sea borne exports and imports of the enemy." Of course, the objection to this presentation of the case lies in the erroneous assumption that the right to blockade an enemy port is simply a phase of a supposed right (which does not exist) to cut off the latter's commerce by any convenient means. With the elimination of this necessary bit

of scaffolding, the carefully constructed argument must collapse.

3. *That the Civil War blockade of the southern coast of the United States offers a precedent in so far as it was an extension of former practices.*

It is true that the Civil War precedents, such as that referred to, marked an extension of familiar practices, but it will be difficult for the keenest mind to find any analogy between American innovations, and that which is introduced by the Order in Council which is under discussion. To the contrary, students of international law, with the cases of the *Peterhoff* and the *Springbok* in mind, will recall how the Supreme Court of the United States recognized the fact that nations are limited by unvarying principles, and in developing the doctrine of the continuous voyage, differentiated between belligerent authority to seize contraband and to extend a blockade to neutral waters, a practice which it refused to countenance.

4. *Convenience of neutral ports to enemy use.*

"Adjacent to Germany," says Earl Grey, "are various neutral countries which afford them convenient opportunity for carrying on trade with other countries." He cites Rotterdam as better suited for certain enemy purposes than the ports of the latter. It is impossible to understand how this juxtaposition of neutral to enemy harbors gives a belligerent any rights whatever over the former. If railways and waterways make neutral docks available to enemy use, that is the other belligerent's misfortune. Austria has submitted a memorandum on the United States' export of munitions to the Allies, and would have it prohibited because the "Central Powers" cannot share in the trade. Here is an instance where situation and naval preparation favor the Allies. International law like municipal law is fixed and cannot be adjusted to meet particular circumstances. The fact that Germany connects overland with nearby neutral seaports gives other belligerents no right to adapt existing law so as to make this marked advantage valueless.

5. *That the interception of neutral commerce intended for enemy use by one belligerent, before it has reached or after it has left a neutral state, is a justifiable "counterpoise" to the freedom with which the other belligerent may send his commerce across a neutral country without prejudicing the latter's neutrality.*

That such an interception is a "counterpoise" everyone will agree, that it is justifiable cannot be sustained. The neutral Power concerned is a sovereign entity. It is for it to say what it will permit, and it is perfectly free to continue both its inland and overseas trade with either belligerent, however useful to the latter, and obnoxious to its opponent, without other interference than such as may arise by reason of its own concession (contraband) or the belligerent blockade of enemy (not neutral) ports.

6. *That an extension of the principle of blockade is defensible if the latter is thereby made effective.*

This is a curious and unusual argument that probably few will remember to have

seen advanced elsewhere. The word *effective* in reference to blockade has to do with the physical assertion of sovereignty over enemy waters. It is intended to define the quality of naval investment. Whether or not a blockade actually exists, therefore, depends upon pressure from without a port, rather than upon conditions within enemy territory that appear to result from belligerent attempts to institute some sort of a blockade. If it were otherwise a belligerent might argue (*post hoc ergo propter hoc*) that a failure of enemy crops caused by unseasonable weather was the direct result of an inconsequential demonstration by the said belligerent's ships. To blockade neutral ports and claim that any following distress of the enemy, even if caused thereby, made the blockade effective, is a proposition that will not be readily accepted.

7. *That Great Britain is not interfering with any trade which she would not have a right to close by blockade "if the geographical position" of the enemy was "such that her commerce passed through her own ports."*

This is gravely to be doubted. A belligerent can hardly assume the control over neutral shipping that Great Britain is exercising in the so-called "zone," without working mischiefs quite apart from the embarrassment caused neutrals by a legitimate blockade. Meanwhile it is not apparent why the aforesaid Power should be entitled to exercise privileges that would only accrue if geographical conditions were absolutely different from what they are.

8. *That the so-called blockade only bars forbidden neutral trade.*

If this is a fact, and it cannot be overlooked that the statement is contested, it does not by any means excuse a breach of international usage. Even police officers under municipal law are restricted in the steps which they take to possess themselves of that which they are authorized to seize. It is not otherwise with nations!

Such are some of the more important points which the eminent British Minister makes in his endeavor to justify the Order

in Council. They can hardly be taken as other than a serious attempt of the English leaders to vindicate action regarding the validity of which they must entertain grave doubts. Three facts support the conclusion that the aforesaid statesmen are not altogether at peace:

1. The pains which they have taken to assure neutrals of their desire to construe the unfortunate decree as liberally as is practicable.

2. Their own acquirements which make it improbable that they can long remain self-deceived.

3. The recent and significant declaration which makes cotton contraband, which may be a step toward extricating themselves from an untenable position.

CHAPTER XVI

PRELIMINARY COMMENTS ON THE LAW OF CONTRABAND

CHANCELLOR KENT briefly but sufficiently defines contraband of war as goods which neutrals may not carry in time of war to either of the belligerent nations without subjecting themselves to the loss of the goods. He might have added that the law of contraband works as much mischief for neutrals as does the law of blockade, and is as arbitrary as the latter is rational and explicable. For where blockade is explained by a logical extension of belligerent sovereignty over waters formerly within the sphere of enemy influence, contraband (recognized by the nations as equally restricting their freedom of trade) rests on nothing but the self-assertive and dogmatizing insistence

of war powers so long acquiesced in as to make it respectable.

It is one thing for the individual, who has a private quarrel with another, to insist that third parties shall not make him relax a strangle grip upon his opponent. It is another thing to hold up and search any individual found in the immediate neighborhood of the enemy's residence and seize such of his belongings as may be intended for enemy use. In the one case the combatant resents interference with an immediate exercise of a sovereign right to do to another what the other would do to him if he had the power. In the second instance he interferes with the sovereign rights of third parties who are as privileged to maintain peaceful relations with the enemy as he is to follow a different course.

That the situation is precisely similar in the matter of independent states must be admitted by those agreeing with international lawyers who are in accord touching two points: (1) That each self-governing

nation is possessed of absolute sovereignty—a self-evident statement—and (2) that Powers not at war have a right to trade with belligerents within spheres not under enemy control, a proposition which seems to have the unquestioned indorsement of the Supreme Court of the United States as set out in the *Bermuda*, and of Lord Stowell, who, in the *Immanuel* (2 C. Rob. Adm. Rep., p. 198), goes so far as to say: "The general rule is that the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable."

If the analogy is a proper one, and if the statements thus made are correct, how can a belligerent justify its aggressive intermeddling with neutral activities? Chiefly on the ground of precedent, which in international and in municipal law is invaluable as a guide to the courts, but which while lending stability to human institutions has not infrequently blocked progress because founded on wrong premises.

To the time of Grotius, modern as well as ancient states had either submitted to the dominant will of an overbearing Power, or looking upon each other suspiciously, avoided the acceptance of other rules affecting their mutual relations than those which were thrust upon them. Thus the most warlike nation, selfishly pushing its own interests, had always carried weight in world councils proportioned to its aggressive spirit; and laws which it did not dictate were shaped by peoples who avoided intercourse except when trying out their grievances by arms, and who were accustomed to look upon neighboring countries, that were not in alliance, as directly or indirectly serving the purposes of the enemy. It is not surprising that with human society thus minded, the individual rights of states were as much if not more neglected than the right of persons. Treaties that were made and treaties that were written disregarded the non-combatant except to lay upon it such burdens as the selfish interests of belligerents might exact, and a

body of law came into being based upon theories which are discredited to-day.

Incorporated in this compendium of legal requirement is the doctrine of contraband—now assented to for so many years, either through fear or as a voluntary waiver of right, that until some modification is generally recognized, it must be accepted in its broad provisions as reflecting the wish of the nations.

Positive law then is on the side of the belligerent who pushes the law of contraband to its limit, however the fact negatives propositions as to national sovereignty and freedom. Nor is the latter without certain arguments to reinforce its legal position. One of these rests upon the theory that a combatant which joins in a fierce struggle with an opponent may properly view as interested and inimical any act of a neutral, however trivial, which strengthens the enemy. Phillimore gives two quotations to illustrate certain aspects of this position.

The first is from Demosthenes: "That

person, whoever he be, who prepares and provides the means of my destruction, he makes war upon me, though he have never cast a javelin or drawn a bow against me."

The second is from Lord Grenville in the letters of Sulpicius: "If I have wrested my enemy's sword from his hands, the by-standers who furnish him with a fresh weapon can have no pretense to be considered as a neutral in the contest."

With such pleas before him the reader is apt to accept the contentions of the old publicist who refused to recognize any such thing as neutrality, and who claimed what undoubtedly is measurably true: (1) That every non-combatant is prejudiced for or against either party to a struggle; and (2) that this attitude brings all so-called non-combatants into the mêlée on one side or the other.

The trouble with this claim, which involves third parties in a war that is not of their making, is that the neutral's right to trade, except as hampered by law, is worthy of

greater consideration, even if that is done which indirectly benefits the enemy, than is any belligerent right to stop such neutral intercourse with the enemy as it believes to be disadvantageous.

It would be well enough if war was accepted either by natural or positive law as representing the normal status of the race. Then a belligerent might properly set out that its interests as such were supreme, and that neutrals must subordinate their concerns to those of a nation which had upset the economic balance of the world.

Fortunately the facts are different now, whatever they were aforetime. The twentieth century views with equanimity such an interchange of national courtesies as binds states together and promotes commercial relations, and abhors the economic upheaval that follows closely in the trail of war. It therefore views belligerency as something abnormal which is to be restrained—not encouraged.

The other argument to sustain the legal

right which the belligerent unquestionably enjoys under the existing law of contraband may be based upon the presumption that contraband is an extension of the defensible doctrine of blockade which commends itself to human intelligence. In blockade, as has been seen, a belligerent by assuming a proprietorship of certain waters, which it is able to enforce, seizes and condemns all vessels which venture therein.

Why, then, says the apologist, should not the same belligerent try to seize neutral vessels before they reach the zone which it is effectively patrolling? By so doing it accomplishes the same results that follow an effective blockade.

The answer is simple enough. Partly because the apprehension of the neutral under such circumstances is uncertain, but more particularly because the seizure takes place in seas that are under no limited jurisdiction, and in which the neutral has as good a right as the belligerent.

Thus another plea for existing law breaks

down, and with the effect of persuading many that if the doctrine of contraband is to remain unqualified, opportunities for international misunderstanding and abuse will continue indefinitely.

It would be better to curtail the powers of the belligerent as far as wide capture and condemnation are concerned. The aggrieved nation could then make such diplomatic representations as its interests might require: refer the matter to any international or other tribunal having jurisdiction; or take forcible action on the ground that the practices of the supposed neutral were unfriendly and constituted a *casus belli*.

CHAPTER XVII

THE UNSATISFACTORINESS OF THE DOCTRINE OF CONTRABAND

THERE is a good deal of nonsense about contraband. This must have occurred to the sages whose treatises gravely rehearse the undoubted facts as to usage. If so, they have felt the restraint of the period in which they have written, and have abstained from critical comment lest confusion follow. Thus from Grotius to Oppenheim the student is furnished with possible, but not positive, lists of neutral goods and chattels that are viewed askance by belligerents. These are classified variously but most satisfactorily as:

Articles that can only be made use of in time of war, which include arms, munitions, military accoutrements, etc., referred to by the London Convention as absolute contra-

band; articles that can never be made use of in times of war, characterized under the London Convention as free goods—articles of luxury are supposed to be of this nature; articles that may or may not be used in war—these are referred to as having *ancipitis usus* by Grotius. They include provisions, money, ships, and articles of naval equipment which have a double use and which may or may not be contraband.

International lawyers are agreed as to the character of these lists as they are in their broad statements regarding the doctrine of contraband. Further than this, however, they did not dare to go until the London Convention, when steps were taken partly based upon precedents, partly on compromise. Some will say the reason for this lay in the fact that the doctrine of contraband is an arbitrary one, resting upon usage, not upon principle; others, because from its very nature the law of contraband shifts with the necessities of the belligerents. Meantime the Supreme Court of the United States has

not hesitated to affirm (the *Peterhoff*): "The classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable."

To illustrate this, one publicist recommends that things which enter into the manufacture of arms and ammunition, of military supplies and of absolute contraband, be regarded as themselves absolute contraband, to which the response is made—That as almost every commodity known to commerce enters into the manufacture of various things having a military use, it may be as well to make everything contraband.

There is enough virile sense in the suggestion thus made to encourage independent thinking. It is manifestly absurd to cut off from a belligerent weapons of war, and at the same time permit all the ingredients which enter into the manufacture of such weapons to be freely shipped. The only difference to the enemy would lie in the cost

of manufacture and the time taken for construction. The weapons would ultimately be provided. Yet departments of state interchange notes regarding the status of this and the other product, as if there were some kind of cleavage by which the Almighty had differentiated contraband from noncontraband.

To the untrammeled intelligence this must all appear like a very roundabout and unreasonable way of dealing with a great problem. To such a mind the facts indicate that neither belligerent wishes trade of any sort carried on with the other. This embraces the free list of articles positively not used in war as well as military supplies. The whole matter is relative. Neutral shipping of cannon to an enemy is one hundred per cent. abominable to the belligerent, but toilet articles may convey some sense of comfort, and therefore are objectionable if only one per cent. Why dicker and fuss over lists of crude and manufactured goods that may or may not be carried in neutral bottoms?

There is no possibility, as witness the experience of the schedules volunteered by the London Conference, that there will ever be such unanimity among the nations as to crystallize into two different groups the prohibited and the unprohibited. It were better, therefore, for a belligerent either to permit trade between neutrals and the enemy or to block the same entirely. Either course would be less confusing than the present method of procedure.

For the purpose of studying the matter further let us imagine a belligerent as giving notice that all articles of commerce would be considered contraband. What would follow? If the belligerent was a powerful nation, able to impose its will upon a neutral trading people, it would undoubtedly have its way. If it were not, its requests, representations, and prayers would go unheeded. Satisfied that it was able to keep the objecting belligerent off with one hand, and turn over its goods with the other, the neutral would continue to follow the course best suited to

its interests. Why should it not? It has sovereignty. The quarrel (mayhap across seas) does not interest it. Is there any reason why it should indefinitely affect the resources of its own citizens, and refuse trade with a friendly Power because warned that this did not please a third party?

The result of facing difficulties in this frank, if embarrassing, manner would stimulate statesmen to do some original thinking. Thus far they have been content to abide by the rulings of doctrinaires, or to work out some such petty subterfuge as is the resource of the opportunist. If, under pressure, trained minds were content not only to eliminate that which is superficial in the law of contraband, but to frame proposals sufficiently akin to natural law to be defensible, it is not unlikely that their overtures by pushing the law of blockade to a reasonable limit would leave the combatant that which it appears to be entitled to, as far as neutrals are concerned, and relieve the latter from a thousand embarrassments which

may readily be the cause of extending the war.

It cannot be denied that such a suggestion has a visionary element when viewed from the standpoint of the past. This is because the world has been content to proceed along lines laid by academic thinkers (who have not infrequently adopted wrong premises) and by far from disinterested treaty makers.

If, however, the astounding changes that have come about with the elimination of time and space by scientific and commercial activity should ever throw the remodeling of international law into the hands not only of professors and jurists, who are indispensable, but of men of affairs, who have promoted large enterprises by straightforwardness and simplicity, and of officers trained in a large way by army and navy service, the law of contraband, as it now exists, will be roughly handled. Why should it not be? Can any system more ridiculous than that which is now law be shaped up?

Under the prevailing doctrine a belligerent

nation of one million inhabitants, with an insignificant navy, is automatically in position after hostilities are joined, and with proper advertisement, to seize and confiscate all the articles of a certain nature that its warships find in the vessels of a nation whose population is from fifty to a hundred times greater, and to do this in the broad waterways of the world over which it has no jurisdiction.

This is not all: by proper announcement it may add to the lists of contraband about every product that it pleases and put itself in a position to do thrice the harm to neutrals that it can ever do to the enemy, all with the apparent seal of unquestioned authority. Such is a possible, if hypothetical, instance. Innumerable others will occur to anyone who cares to give the matter thought. For our present purpose one case is sufficient—let us bear it in mind as we more particularly review the law of contraband as it stands, and should be observed until such time as amendment can be made.

CHAPTER XVIII

GENERAL RULES—ABSOLUTE CONTRABAND

IN the interest of neutral nations, which in ordinary times must compose by far the majority of civilized states, these pages have set out some of the incongruities and unsatisfactory features of contraband, without more particularly discussing recent and present practice than to call attention to the three classes—"absolute contraband," "free goods," and "*ancipitis usus*"—into which it has been divided.

It is now proposed to deal with the subject specifically by referring to a few general rules, giving examples of contraband assigned to each of the above classes, and noting certain extensions of the doctrine. General rules may be summed up as follows:

1. Contraband is limited to goods or

commodities shipped by a neutral for enemy use.

2. The carrying of contraband is in defiance of belligerent requirements, and belligerents (it must be regretfully stated) are by international consent placed for this purpose in control of all trade routes. A belligerent can therefore confiscate in belligerent or open seas (not in neutral waters) the captured cargo of a vessel bound to an enemy port, or which will touch at an enemy port, on its way to a neutral destination—provided the goods are such as become contraband when destined for the enemy.

3. The fact that a cargo of contraband is intended for a neutral or bound to a neutral port will not help the owner, if it appears that the forbidden goods are to be transshipped to the enemy. This has to do with the doctrine of the continuous voyage. It appears to make no difference whether one or more neutral ports intervene before the goods are delivered to the enemy, or whether they reach the latter by land or sea carriage.

4. There are certain articles (*ancipitis usus*) which can be used for war or not, which it is yet clear would be of great advantage to the enemy, if shipped to places held by its armies or navies, to fortified places, or to the government and its subsidiaries. Such commodities are known as conditional contraband, and are exposed to seizure and confiscation.

5. A vessel cannot be captured which has delivered contraband and is homeward bound.

6. All goods belonging to the owner of contraband and forming part of the same cargo may be confiscated, and the vessel itself may be contraband.

7. Vessels bearing contraband must be taken to a prize court.

8. There is some recognition given to belligerent rights to preëmpt neutral vessels and cargo not clearly contraband; Phillimore writes more at length on the subject than later English authorities.

These regulations are given, not as crystallized and authoritative, but as presenting

reasonable ground for recognition in the fact that they are offered by the Declaration of London, and have been accepted for some time by a respectable group of Powers. That much is unsettled as to their final form and interpretation will readily appear to anyone who reviews the matter historically.

Meantime, if there is doubt in regard to general rules, there is absolute confusion in the classification of goods and commodities that may or may not fall under the law of contraband. Taking these up in order we find eminent publicists listing most of the following articles, because of their special adaptation to military use, as absolute contraband. The list is affirmed *in toto* by the Declaration of London:

1. Arms, including arms for sporting purposes, and their parts; 2. Projectiles, charges, and cartridges of all kinds and their parts; 3. Powder and explosives, specially prepared for use in war; 4. Gun mountings, limber boxes, limbers, military wagons, field forges, and their parts; 5. Military clothing and

equipment; 6. Military harnesses; 7. Saddle, draught, and pack animals suitable for use in war; 8. Articles for camp equipment and their parts; 9. Armor plates; 10. War-ships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war; 11. Implements and apparatus designed exclusively for the manufacture of munitions of war, and for the manufacture or repair of arms or of war material for use on land or sea.

No notice is required in the case of the above articles, but to these is attached a first class of conditional contraband which becomes absolute only "after special declaration and notification," viz.:

1. Foodstuffs; 2. Forage and grain; 3. Clothing, fabrics for clothing, and boots and shoes for use in war; 4. Gold and silver, etc.; 5. Vehicles of all kinds available for use in war and their parts; 6. Vessels and craft, docks and their parts; 7. Railway material and stock, material for telegraph and telephone; 8. Balloons and flying machines and

accessories; 9. Fuel and lubricants; 10. Powder and explosives (not specially prepared for war use); 11. Barbed wire and implements for cutting, etc.; 12. Horseshoes and shoeing material; 13. Harness and saddlery; 14. Field-glasses, telescopes, chronometers, and all kinds of nautical instruments.

These lists have been given in full that they may be studied in connection with the notices given by the present warring Powers. On August 5, 1914, the United States Ambassador in London received from the British Foreign Office a list declared by it to be absolute and conditional contraband, especially during the present war. Section 1 included the list referred to above as absolute contraband of the first class, which is practically that of the London Declaration with the exception that an additional group of articles was substituted for those marked 11, the latter being designated as 12.

The new group (11) included aeroplanes, airships, balloons, and aircraft of all kinds and their component parts, together with

accessories and articles recognized as intended for use in connection with balloons and aircraft. Schedule II., the list referred to above as conditional contraband (becoming absolute on declaration), included thirteen groups instead of the fourteen of the London Declaration, the eighth group, composed of balloons and flying machines, being eliminated and made, as has been noted, group 11 under Schedule I.

On August 11 and September 9, 1914, the French and Russian governments respectively adopted the schedules for absolute contraband earlier proclaimed by the British government. It remains for us in another chapter to note the changes that have followed with the succeeding months.

CHAPTER XIX

CONTRABAND AS FURTHER DEFINED BY RECENT PROCLAMATIONS

ATTENTION has been called to the fact that shortly after the outbreak of the war the Allies adopted Articles 22 and 24 of the Declaration of London which designates, with minor changes, eleven groups of absolute contraband and fourteen groups which belong to the first class of conditional contraband.

Sept. 4, 1914, Ambassador Gerard notified the United States Secretary of State that he found the list which the German Government intended to treat as contraband agreed with the same articles, and on Sept. 7th, Ambassador Penfield followed with a similar announcement for the Austro-Hungarian Government from Vienna. The latter date marks the

nearest approach which the belligerent Powers came to putting in practice the formal provisions of an instrument which was supposed to reflect the best thought of their statesmen, and which had been drafted to meet the exigencies of war.

Hardly had the United States, under date of Oct. 22, 1914, withdrawn the suggestion to the European combatants "that the Declaration of London be adopted as a temporary code of naval warfare," than Great Britain, Oct. 29, 1914, supplementing a proclamation of Sept. 21st, of the same year, consolidated lists of contraband already published with additions thereto. This new list added to Schedule I. (absolute contraband): Sulphuric acid; range finders and their component parts; hematite iron ore and hematite pig iron; iron pyrites; nickel ore and nickel; ferrochrome and chrome ore; copper unwrought; lead, pig, sheet or pipe; aluminium; ferrosilica; barbed wire and implements for fixing and cutting the same (heretofore listed with conditional contraband

of the first class); motor vehicles of all kinds and their component parts; motor tires—rubber; mineral oils, and motor spirits, except lubricating oils.

The list amended Schedule II. (conditional contraband to be regarded as absolute) by eliminating barbed wire and adding: Sulphur: glycerine; hides of all kinds, dry or wet; pig skins, raw or dressed; leather, undressed or dressed, suitable for saddlery, harness, or military boots. The rearrangement placed twenty-six groups under the head of absolute contraband, and fifteen under the head of conditional contraband of the first class, an addition of sixteen distinctive classes of goods or materials.

Considerable as was the readjustment thus formally decreed, it proved to be insufficient to meet the requirements of the United Kingdom, for under date of Dec. 23, 1914, March 10, 1915, and March 11, 1915, there were added to Schedule I. ingredients of explosives: Resinous products, camphor and turpentine (oil and spirit); submarine sound signalling

apparatus; various metals and ores (added to groups already numbered); raw wool, wool tops and noils and woolen and worsted yarns; tin, chloride of tin, tin ore; castor oil; paraffine wax; copper iodide; hides of various sorts; ammonia and its salts, etc. When it is noted that under the single head of explosives twenty or thirty acid, chemicals, and products of coal tar are specifically mentioned, the list of forbidden merchandise becomes bewildering, the situation being in no way improved by the fact that Class I. of Conditional Contraband (to be regarded as "Absolute") was further revised.

It is hoped that this brief review will give the reader some idea of the extraordinary restraints placed upon neutral trade. Incomplete as it is (since by subsequent proclamation of the French and Russian governments the British list is made their own), it will serve to indicate the attitude of the Allies up to the spring of the current year. (The action of the Central Powers is less significant. Not being in a position to

interfere with shipping in the great waterways of the world, they have naturally been more modest in their declaration of prohibited merchandise, but through Germany under date of April 15, 1915, have taken a step in the other direction by indicating fifteen groups of articles which cannot be declared contraband of war.)

What is to be done in the premises? With decided objections to becoming embroiled in the cataclysm over seas; with a feeling that the group of belligerents, which controls the oceans by their naval forces, are within their rights, if precedents are to be considered; and with a large percentage of its people sympathetically disposed to the Allies' cause—the United States is yet as definitely affected as if it were itself at war: (1) By restrictions of friendly Powers; (2) by the interpretations placed upon those restrictions.

Can anything be suggested to right matters? The natural answer is—"No! Not if Americans are content to tramp in the beaten path of custom's treadmill."

If, on the other hand, our people are keen to recognize the necessity of fairly treating combatants who are, for the most part, within what has heretofore been recognized as belligerent rights, but eager to do away with doctrines that are antiquated and prejudicial to the best interests of the race, they may readily say to their Department of State:

1. Use your good offices during the present war to secure from belligerents such modifications of their contraband lists as will relieve the neutral shipper from the embarrassment of acting in constant uncertainty regarding the sort of shipments permitted him.

2. Arrange so that opportunity shall offer at the end of the war for the United States to push for such a curtailment of the whole doctrine of contraband as will leave neutral shipping unaffected by belligerency up to the moment when it enters a war zone. Better, as has already been suggested, that a loaded United States merchantman should enter

forbidden waters with the anticipation of having her entire cargo, whatever its nature, sequestrated, than that every exporting house and all skippers should be obliged to retain a staff of expert chemists and physicists to tell them whether or not their vessels may poke their prows out of home harbors without being haled before distant prize courts.

As matters stand, a United States ship loaded with tooth powder leaves port with the distinct chance of being overhauled by an allied cruiser; charged with carrying contraband, on the claim that the tooth powder is nothing more nor less than some basic proposition with a name familiar to chemists only, or because the captain of the war vessel is in doubt; and carried out of his course to await the decision of a court whose docket is too crowded to give him any hope of having his case adjudicated.

The instance in question presumes the captor to be British or French. If it happened to be German, under the Imperial Government's interpretation of existing treaties,

is there not reasonable ground for believing that both ship and cargo would be immediately consigned to the bottom of the sea?

CHAPTER XX

CARRIAGE OF CONTRABAND—CONTINUOUS VOYAGE

WE have seen how the general principles of the doctrine of contraband have received enough endorsement from sovereign states to make them respectable. We have also seen by reference to the great war drama now unfolding how the last and best attempt of the nations to designate by the London Declaration what shall and what shall not be contraband has failed, thus denying to neutrals that which law is supposed to furnish for them, viz., such an accurate understanding as to their rights and duties as may prevent erroneous action.

With such a collapse to advertise the shortcomings of an artificial doctrine it may well be hoped that the time is not far distant

when, instead of meeting in grave conclaves to classify contraband, statesmen will put all neutral goods on the free list that are outside of guarded waters. Until that time comes neutral shippers will have to think of international law in this aspect as forbidding and against nature. In the meantime those of them that are informed are not likely to forget that while the law which *permits* belligerents to interfere with neutral ships outside of the sphere they dominate is "international," the prohibition which contraband carrying neutrals break is "*municipal*"; a fact which will continue to make such restrictions the more odious, as well as the less defensible.

The more odious because they affect to control a citizen who owes no allegiance to any other country than his own in fields where the forbidding Power has absolutely no jurisdiction. The less defensible because these restraints lack the characteristics which would attach to them (as far as the offender is concerned) if the country of the latter had

joined in their enactment. This way lies progress, for when law or custom that is arbitrary and unnatural becomes hateful to the few who realize that they and their fellows are bound hand and foot thereby, means are generally found to open the eyes of the blind and substitute something that is sane and reasonable.

From an inquiry into the character of articles which have been or are now designated contraband, we naturally pass to a brief discussion of the carriage of contraband, which has had some reference in preceding summaries. Here, as when considering what is contraband, we are at once plunged into so much confusion that it is a relief to quote the London Declaration, rather than to attempt to analyze policies and opinions which preceded it.

By this instrument goods which, if bona fide intended for another neutral, cannot be meddled with by a belligerent, are open to confiscation:

1. If they fall within the list characterized

as absolute contraband, when it is evident that the carrying vessel: (*a*) Is bound for an enemy port; (*b*) is sailing for an enemy port although her papers indicate a neutral destination; (*c*) is sailing for a neutral harbor with papers suggesting neutral consignees, but is arranging to stop en route at an intermediate port or to meet armed enemy forces:

2. If they fall within the list characterized as conditional contraband when the carrying vessel: (*a*) Is destined to an enemy port; (*b*) is so clearly out of her course to the neutral port indicated in her papers as to require adequate explanations which she is unable to give.

Unfortunately it is too early to comment satisfactorily upon the manner in which belligerent states are interpreting these rules and the attention which they receive. With the general law of contraband what it is, however, it does not take a very astute observer to appreciate that in the hands of

tions at war they may become very oppressive and are so framed as to serve belligerent

interests. Thus the combatant, who fails to intimidate neutrals from attempting to conduct legitimate trade with the enemy by posting endless lists of contraband, can overhaul cargoes after they are once afloat and avoid the risk of letting prohibited articles come into enemy hands.

It is in connection with the carriage of contraband that we come in touch with the doctrine of the "continuous voyage" as a so-called extension of the general law which we are considering. This is nothing more than the application of existing contraband rules to cases that, because of subterfuge or trickery, are claimed to be immune. It comes into play when a ship loaded with contraband puts into a neutral port designated in her papers with the design of either transshipping the cargo to an enemy destination ("continuous transports") or of herself conveying it thither.

At the time of the Civil War the United States courts, handling cases which were frequent and annoying (see notably the

Bermuda and the *Peterhof*), gave the first clear expression to a practice that was already familiar, though contested by both British and Continental authorities. So convincing were their reasonings that, as has been the case with scientists and physicists who have first stated in terms that which others vaguely appreciated, they received credit for emanating something new, and some ingenious theories have recently been propounded to endorse questionable practices on the presumption that the United States Supreme Court had furnished precedents which justify an expansion of belligerent activities.

This is far from the fact. All that the United States Supreme Court did in the period referred to was to deny most emphatically that any hocus-pocus like landing a contraband cargo in Matamoras or Nassau for the sake of making it immune, before delivering it in Florida, would be of any effect in making the commodities in question unobjectionable. One does not have to be a learned justice to see the sanity of such a

position, but one does require rare scholarly abilities to make a statement which will cut through the technical objections of legal practitioners. That ability our courts supplied to such good effect that not only eminent publicists upon the Continent accepted their decisions as authoritative, but British ministers and jurists shifted their attitude and adopted a course in line with what is now referred to generally as an American doctrine.

CHAPTER XXI

UNNEUTRAL SERVICE

NO sooner does war break out than the most prudent of neutrals, if it happens to be a commercial nation of importance, is embarrassed with successive notes from the chancellories of the belligerent peoples, protesting against unneutral service. As these charges, more or less veiled in diplomatic language, frequently balance each other, they need not necessarily be taken too seriously.

Thus where each nation is purchasing equal shipments of rapid-firing guns it is obviously absurd for either to protest against a practice which directly serves its own purposes.

Meantime the exigencies and fortunes of war are sure to develop situations that not unreasonably arouse belligerent suspicion that the enemy is being unfairly favored.

It may be in matters apparently trivial from the neutral standpoint.

It may be in matters so serious as to make the neutral appear to be in a sort of veiled alliance with the foe.

If there is ground for such accusations, nothing remains for the neutral but to retire from an untenable position.

If the charges are without warrant, and the neutral is clearly within its rights, it may not only be put in a most humiliating position by submitting to belligerent dictation, but provide precedents that will retard the progress of the nations.

With portentous developments depending upon correct action, or the contrary, it is therefore of inestimable importance that neutral governments should familiarize themselves with accepted principles, so that they may avoid breaches of defined rules unless there is competent reason for so doing.

In making such preparation two facts will become evident:

1. That there has been a distinct effort during the last generation to characterize the sort of impartiality which is expected of neutrals; and

2. That praiseworthy as the attempt has been to mark the limitations of neutral and belligerent intercourse, it has not been altogether successful.

Twenty-eight years ago Francis Wharton in his "Digest of International Law of the United States" (taken from administrative documents, the decisions of Federal Courts and the opinions of attorney-generals), summarized restrictions on a neutral in the form of the following duties, viz.:

1. The duty to restrain enlistments by belligerents. (This cannot be presumed with recent experiences in mind to include the prohibition of reservists sailing as individuals from neutral ports to rejoin the colors.)

2. The duty to refrain from "the issuing of armed expeditions."

3. The duty to restrain the fitting out and sailing of armed cruisers of belligerents

(this emphatically includes the providing of ships of war by national act).

4. The duty to prevent the passage of belligerent troops over its soil (the latest authorities do not permit this, even if provided for by treaty prior to the war).

5. The duty to prevent the use of its territory as a base of belligerent operations.

6. The duty to prevent belligerent naval operations in territorial waters (belligerent war vessels and their prizes may pass through neutral waters under the provisions of the recent London Convention).

7. The duty to prevent the sale of prizes in its ports. (by Articles 21 and 22 of the London Convention prizes may be brought into neutral ports if unseaworthy or because of special conditions.)

8. The duty to redress damages done to belligerents by its connivance or negligence.

In a general way the duties thus briefly affirmed with the comments thereupon are undoubtedly as well fitted to serve United States Cabinet officials desiring information

in regard to national responsibilities in time of war, as the ordinary deportment book is suited to instruct young persons in polite manners.

So far so good, especially since the rules thus recapitulated still have force and have been recognized by the United States at least as entirely applicable to its conduct during the present war.

Meantime Article 3 of Convention V and Article 5 of Convention XIII of the Hague Conference of 1907, because they have to do with matters undreamed of at the time of Wharton's publication, suffice to show how impracticable it must ever be to comprehend in any text-book or digest all the particular acts or classes of acts that a neutral must refrain from doing if it wishes to preserve cordial relations with belligerents.

These Articles, selected from the fifty-eight framed by the aforesaid Convention, respecting the rights and duties of neutral Powers on land and in maritime war, forbid the erection by a belligerent "on the territory

of a neutral power of a wireless telegraph station or other apparatus for the purpose of communicating with belligerent forces on land or sea," and hold the neutral responsible for permitting the occurrence.

Such an instance illustrates as admirably as would a dozen, the fact that a neutral must be guided by principles rather than by the letter of the law, and that common sense and a desire to do equity will be worth more than any digest however authoritative. Bearing this in mind it is well to note other restraints upon neutral activity than those marked by Wharton, but which have received certain if not final recognition. Among these are:

1. The duty to prevent a belligerent from setting up a prize court on neutral soil.

2. The duty to prevent a belligerent from using neutral territory as a base for manufacturing arms or supplies (reference is made elsewhere to the proper resentment a neutral may show when belligerent plotting interferes with the industrial activities of private citizens).

3. The duty to prevent belligerent warships from making neutral ports a base for war activities. The rule is that not more than three at a time should be admitted to a given harbor and these can only remain for repairs, or to coal or provision—a sharp limit being placed on the time of their continuance and care being taken that they do not receive arms or military supplies.

4. The duty to intern belligerent ships that fail to obey orders to leave port.

5. The duty to refuse a belligerent the privilege of marching prisoners through neutral territory.

6. The duty to prevent its war or public vessels to directly aid a belligerent by carrying armed forces, stores, dispatches, or war material.

7. The duty to prevent its official agencies of whatever character from giving a belligerent news which may be used to the disadvantage of its opponent.

8. The duty to exact from belligerents such compensation as the occasion may

demand for unpreventable acts which both violate its neutrality and injure the other belligerent.

9. The duty to secure the release of prizes taken or prisoners captured on its territory.

10. And generally, in accordance with Articles 8 and 25 of Convention XIII of the second Hague Conference, the duty of employing the means at its disposal to prevent acts favoring or damaging a belligerent.

Such are certain of the obligations which are automatically imposed by war upon a state which announces its intention to remain neutral.

That they are sufficiently burdensome is apparent. Notwithstanding this there are those that would add to their number by making a neutral nation responsible for the acts of its subjects. This is preposterous. Even a small state cannot undertake to keep the surveillance of its people which any rule framed upon a like conception of its responsibility would require.

Belligerents must, therefore, rest content with the fact that they have long been permitted to enforce their own police measures against such neutral individuals as transgress their reasonable laws. For the temper of the world is changing with the elimination of time and space, and there is little humor for further concessions.

It was well enough for wrangling states, that were so disposed, to arm and pitch into each other during those golden times when three-quarters of the world were oblivious of what was happening in the other quarter. Belligerents could then dictate to peaceful neighbors without fear of armed protest. That time is long past, however, and war, always as much of a nuisance to those on its outskirts as it has been a tragedy to the peoples directly concerned, is bound to weigh with increasing heaviness upon neutrals. It is better that these latter, instead of giving further bonds to the quarrelsome, should either lay aside their neutrality when righteousness and justice are shocked by the

unconscionable aggressions of a militant state, or if there is equal guilt, refuse to give the combatants the consideration now vouchsafed.

CHAPTER XXII

CARDINAL RIGHTS

REFERENCE has been made to the criminations that belligerents file against neutral states with the advent of war. What about counter-charges from neutrals! Unfortunately for a reason already given—viz.,—the habit of considering belligerency not only most respectable, but of such dominating importance as to be controlling—little has been written or said about the sort of comity and fair treatment that neutrals may properly demand from belligerents.

Surely the time has come to turn things about and to insist that the engagements of states to each other, whether express or implied, be carefully regarded whether war distracts the attention of a party to the contract, or not.

This means that the neutral must be as insistent as vigorous in defense of its rights, and as alert as is the belligerent; instead of standing by, paralyzed by the mere suggestion of war—as if such a status like some necromancer's rod were capable of turning everything topsy-turvy.

Such action is nothing more than a demand for justice. Unassailable because of the righteousness of its attitude, it is probable that a powerful neutral state can do more to bring about a proper adjustment of human affairs by firmness on a single occasion, than by repeatedly yielding its rights. The one course makes toward peace—the other and weaker way gives aid and comfort to the war-lords and encourages them to stir up further broils and aggressions.

That such insistence upon the kind of treatment which is demanded by self-respect need lead to hostilities, does not follow. If nations are like individuals, and certainly there are many points in common, it is less dangerous to require ordinary consideration

from others than to submit to successive indignities until the aggressor is led to do something which will cause the most timid to turn.

Meantime a nation that values its own rights will avoid trouble by a natural regard for the rights of others. It will also be a wise enough and keen enough observer to avoid asking that which is impracticable, as will be the case when a country in which neutral property may be located is held by an invader, or the approach of a hostile army has paralyzed the operations of the civil government.

What are these rights which every neutral may properly assert, but which they have guarded in such a slovenly fashion heretofore:

1. The right to the integrity of its own territory, and to prevent its misuse by foreign powers for any such operations or purposes, military or otherwise, as may embarrass a nation with which the neutral state is at peace;

2. The right to the integrity of its bays

and harbors together with the waters, which it dominates, and which it is believed will shortly be conceded to cover a space along its coast far wider than the marine league honored in the United States since the days of Washington.

3. The right to have its merchantmen and public ships pass unintercepted over the high seas, provided they commit no such breach of enemy requirements in the matter of blockade and contraband as the neutral may have conceded that belligerents are entitled to impose; this unequivocally includes the right to continue its trade with other neutrals;

4. The right to forbid belligerent interference with neutral goods, which are not contraband, on enemy ships, or of enemy goods on neutral ships;

5. The right to require from the belligerent courteous treatment of neutral officials and citizens, and such protection of neutral property as the non-combatant may, all other things being equal, expect in times of

peace. It is of course recognized that this is subject to exigencies of war that may make it practically impossible for the belligerent to afford such police and other protection as it would gladly supply under different conditions; also that the rule is subject to the understanding that certain neutral property belonging to neutral citizens resident in enemy territory, acquires enemy character, notwithstanding the fact that it is still to a degree under the protection of a neutral government;

6. The proper recognition of treaties, conventions, and agreements between the two nations;

7. The right to maintain intercourse with a belligerent government or with belligerent governments without let or interference, provided the neutral perform no unneutral act;

8. The right to insist that belligerents shall avoid doing anything in neutral territory designed to cause embarrassment if not actual injury to a friendly people. This matter

will be treated separately because of its importance, and because the experiences of the United States since the fall of 1914 appear to justify a fuller treatment than it has heretofore received;

9. The right to protect its citizens in their intercourse with belligerents, provided the former do not contravene such belligerent requirements as are sanctioned by neutral acquiescence.

That there are other rights than those thus classified will readily occur to every reader, although they have as yet had scant recognition by international lawyers. Prominent among these, and of particular interest to the United States, should be those which arise in connection with eleemosynary enterprises in which citizens of neutral countries have engaged for the benefit of belligerent subjects, and under such official approval as has warranted the expenditure of enormous sums of money and the sacrificing service of valuable lives.

It is one thing for a group of citizens,

whether incorporated or otherwise, belonging to a given country, to locate a business proposition in a foreign land and under the protection of a foreign flag. It should be quite another thing for the same group to maintain institutions which are educational in character among the people of a friendly state, provided the project meets with the endorsement, if not the encouragement, of the ruling Power. In the former case a tax is rightly exacted, and the alien association must expect to share with natives the discomforts to which they are exposed because it has shared their advantages. In the other, the enterprise is unselfish; is maintained for the benefit of the nation within whose borders its activities occur, and frequently is bulwarked through official action with particular privileges. Nothing less than distinctive motives differentiate the two lines of effort, and one does not have to be a subtle thinker to discover reasons why the experiment which is humanitarian and helpful, should take on a more favorable aspect when sub-

mitted to the war test (not accorded it to the present time) than the business venture deserves. However this may be, there is certainly ground for governments like the United States and other neutral Powers to make strong representations when the flame of war threatens to scorch and jeopardize institutions located abroad, which their subjects have financed, and which are designed to promote international good-will.

Such rights as these, however sentimental they may appear to the cynic, demand attention both from the standpoint of the interested nation and again from that of the society of civilized states whose ultimate welfare is dependent upon a growing comity and the reign of law. The reason is apparent, for if they, as well as the classified rights above referred to, be treated with indifference by the ministries mostly concerned, it will naturally eventuate that the extraordinary developments which are bringing the nations into a closer intercourse will produce disorder and chaos rather than amity and progress.

The suggestion comes with a glimpse into the future! Meantime the field thus cursorily touched should prove a fascinating one to the international lawyer and publicist, for many abuses that are interfering with interstate confidence await correction.

CHAPTER XXIII

EXPRESSION OF OPINION

UNDER date of August 19, 1914, the President of the United States through the medium of the Senate appealed to the citizens of the Republic "to assist in maintaining a state of neutrality during the present European War."

Drafted with the skill that is noticeable in every message from Mr. Wilson's pen, and reflecting the high and honorable purposes of the Executive, the document properly caused remark at the time and may still be advantageously used to introduce a discussion of the limitation of speech in neutral countries.

Is it incumbent upon the people of a country that has proclaimed its neutrality to refrain from that sort of comment upon belligerent

policies or action which proclaims partisanship? It is inconceivable that any other answer than one that means No! can be framed, unless such expression be authoritatively and lawfully enjoined by the government. Nor does it follow that any exception can be made because the Powers at war or either of them are irritated thereby. The latter are free, if it suit their purpose, to take notice of what is happening in a sphere which is absolutely outside of their control, and may even go so far as to threaten or force hostilities. The neutral state owes them no such duty as may entail a gag law, and there is no privity between them and the citizens of another sovereignty. If they take action, therefore, it must be on some plea analogous to necessity, as viewed from their standpoint. It cannot be a matter of right.

Having disposed of the first question in a manner by no means uncertain, the inquirer finds himself confronted by a second, which to a fair-minded person is no less impressive.

Is it desirable for the people of a country

which has proclaimed its neutrality to refrain from an unfettered discussion of all issues which are being tried out between the belligerents as well as the motives, standards, and policies of the latter? Yes! If there is bias, blind prejudice, and unworthy motive behind the spoken speech, or the sort of partisanship that may be readily challenged because it prefers some other cause to that of country.

No! and eternally No! if the land of one's nativity is directly concerned and its future may be affected thereby. Such conditions should and do present moral elements which may even be conceived of as justifying a good citizen in challenging the mistaken authority of his country, if the latter attempts to bridle the expression of opinion. They certainly therefore permit the utmost frankness of speech in cases where there is no restriction of municipal law, and one finds it difficult to think of any enlightened people, whether under the sway of a sceptre or self-guided, which might not otherwise find its dearest interests imperiled.

This is particularly true of a democracy!

From the time when Montesquieu in distinguishing his three forms of government differentiated the republican from the monarchial and despotic, by pointing out that the whole body of the people therein took part in the government and each individual assumed the responsibility thereof — the thinking world has taken it for granted that this sort of body politic must inform itself and these citizen units ought to inform themselves regarding both exterior and interior affairs so that the interests of the people may be guarded.

With these facts in mind one finds it difficult to understand those phrases in the dignified appeal of President Wilson which suggest withholding of discussion and judgment, unless they may be explained:

1. By the failure of a layman, whose patriotism and wisdom are beyond question, to appreciate the difference that exists between the official action of a state and the informal and private utterances of its people.

2. By the conviction that his warning must be so framed as to prevent actual collision between the millions of European-born citizens of the United States whose affiliations separate them into various camps.

That the first explanation would not be unnatural will occur to those who are familiar with the confused manner in which international lawyers of repute have handled the question of national partisanship, and who recall that the Chief Magistrate was called to meet a great crisis with brief time for meditation.

As to the second—it must be noted that one-third of the appeal calls attention to the diverse character of American citizenship and bears witness to the fact that this aspect of our national status had made its impression on the President's mind.

Certain of these sentences are as follows: "I venture to speak a solemn word of warning to you against that deepest, most subtle, most essential breach of neutrality which may spring out of partisanship, out of passion-

ately taking sides." We must be "a nation that neither sits in judgment upon others," etc.

It is not improbable that they were at first and are still misinterpreted, and that the President meant nothing more than to push a little further the thought expressed when he says—"we must be impartial in thought as well as in action"—which is certainly rational and beyond criticism, in that it counsels judicial fairness in the use of the thinking processes.

If so, there exists no ground for objection.

If, to the contrary, there was an intention to convey the idea that citizens individually or in conference must not under any circumstances stir public opinion to such a degree as will make war possible and probable—there is certainly ground for challenging the counsel thus given, because of the serious consequences that might follow silent acquiescence in the misdeeds of a foreign Power.

No one knows, and few dare to hazard an opinion as to the close of the war which

furnished the occasion of this particular message. Meanwhile every intelligent person appreciates the fact that whenever actual hostilities cease, or whatever cause is dominant at the end—every State of consequence is apt to have its political or commercial policies distinctly shifted in the rearrangement that will follow. How can the appreciation of such pregnant consequences exert other influence than force upon the loyal citizen of every neutral country the necessity of watching the course of events as it unrolls itself, and interchanging opinions with others thereupon.

It may be that the outlook is portentous, and that *now*, not to-morrow, is the time for action. In that case, belligerency, not neutrality, will be in order.

It is because of this necessary attitude of a brave and vigilant people that any advice which looks toward the preservation of neutrality must be carefully scrutinized, bearing in mind that the *safety and prosperity* of their native land is the object, not neutral-

ity because of any virtue in itself. Neutrality is a means to an end—an end which may mean peace and may mean warfare, but does not necessarily mean either in the largest sense of the word. When it becomes worthless as a means, it cannot too quickly be thrown aside.

In making use of the President's appeal for the purpose of considering in a general way the right of the citizen of any neutral country to fully express opinion regarding belligerent activities, whether or not the spoken or written word indicates something of bias—we are led to deal directly with the present attitude of the European nations toward the people of the United States.

That this ranges from criticism where ministerial action is frankly condemned, to direct hostility engendered because of a conviction as to the trend of national sympathies, is obvious and natural. The pity is that in either case there should be a disposition to regard the American people as unneutral, notwithstanding their approval of an official policy which is beyond suspicion.

In the first instance it must be remembered that few cabinets exist in these days without having to endure the scorching faultfindings of the people they represent. It is therefore perfectly natural that groups of individuals who suffer directly from the policies inaugurated by a Power to which they owe no fealty, will give vent to cynicism, if not to justifiable anger. All this is natural and without significance.

As to the trend of national sympathy in a neutral country that is unexpressed officially —it can no more be prevented than the succession of the days! Thus if a belligerent is fighting for that which a neutral people believe to endanger their own interests, the latter are bound to comment. This was to be expected and is expected. Meantime the belligerent can congratulate itself if from any motive it is receiving the same courtesies that is offered its enemy.

What is thus said in general has a particular illustration in the attitude of Americans toward the contending nations of Europe.

Earnestly devoted to the free institutions, which are a passion with them as they were with the Fathers of the Republic, they can have no fondness for autocracy itself, and can only dread its achievements. To suggest otherwise would be a hypocrisy which would deceive no one, and could add nothing to a sovereignty's fair attempt to perform its duties impartially.

Meantime a generous enthusiasm for their own ideals does not preclude their enacting the rôle of a neutral Power and even leaning backward in their attempt to rigorously observe the requirements of the part they choose to play.

Let us remember that neutrality is one thing, but that national sympathy is another, and that no good can come from confusing the two.

CHAPTER XXIV

BELLIGERENT AGENTS IN NEUTRAL STATES

THE extraordinary activity of belligerent agents in the United States during these days of stress and strain introduces a new factor into the field of international law. One of the results of a slovenly immigration policy, it must none the less be regarded as a natural sequence of that twentieth-century restlessness which is driving people over their own boundary lines and into other domains. For the present North America is reaping the unhappy results of her acquisitiveness. To-morrow it may be the Argentine or Chili, or yet again some new Asiatic state as yet unshaped. The inpouring of a host of immigrants and the joining of hostilities by the countries from which such immigrants come, are the only requirements. This

makes it particularly necessary to think and act wisely with the first stirring of the factors which are startling the United States.

Given a group of foreigners owing allegiance to a nation that is at war, but themselves domiciled in a neutral country or living therein as official representatives of their government, and which concocts schemes for the destruction of neutral possessions, whether the same be manufacturing plants, material in the course of construction, or finished product—does the government, which is itself, or whose people are impoverished thereby, owe any duty to the profiting belligerent or its subjects, whether the same be acting under its orders or upon their own initiative?

It is unthinkable that any obligation should exist in the matter of private persons, inasmuch as these are as responsible to municipal regulations as are citizens. As for consuls, ambassadors, and the like, while their precious persons may require certain consideration, they are supposed to stand

for the Power they represent, and in offending, offer a direct challenge from those whose servants they are. If any duty exists in this case, it would seem to be a colorless one of using polite phrases and manners while demanding satisfaction; or declaring war in terms sufficiently correct.

With duties thus disposed of the matter of rights may be considered without the embarrassment which comes when there is the uncertainty of a possible obligation. What rights has a neutral government in the premises?

1. The right to insist that the belligerent with which it is at peace, should not only abstain from interference with a friendly Power's internal concerns, but should—

(*a*) rigorously handle diplomatic representatives who volunteer the sort of destructive service which may at any moment offer a casus belli;

(*b*) use its good offices in discouraging its subjects resident in neutral territory from the performance of such reprehensible practices.

2. The right to handle alien malefactors already amenable to her municipal law, with special severity, as open to a charge which criminals, who are citizens of the neutral state, are not suspected of, viz.: levying war upon the aggrieved sovereignty, and therefore guilty of a felony which is akin to piracy.

In this connection the report that the Attorney-General of the United States, instead of acting in the face of repeated outrages of belligerent origin, is content to search for proper legal authorization along the line of the Sherman Act which will justify him in dealing effectively with an extraordinary situation, should have been received *cum grano salis*, and has been already discredited.

Meantime it will not be sufficient for this nation or any nation to attempt to deal with this product of loose immigration laws by the sort of regulative enactments which national legislatures pass to prevent the growth of domestic abuses.

For this outgrowth of twentieth-century conditions is *treason or war*—treason when

exploited by citizens of a double allegiance, and war of a most terrible sort when demonstrated by those members of the alien population of a country who take upon themselves destructive measures.

Up to the present time the United States appears to have been fairly complacent regarding its rights in this matter. It cannot long continue so, because, ingenuous as are its public men in their belief that some favoring divinity will shield it from the debacles and tragedies that affect other states, belligerents are bound to appreciate the fact that a blow at its industries is the easiest approach to the vitals of the enemy.

With an increase in their activities there should come an arousing from slumber, and self-queries as to whether the nation, which has formally proclaimed itself a *neutral*, is not really getting the sort of blows which belligerents interchange without the privileges of belligerency. Then perhaps the nation will stir, and do that which will prove a useful precedent for all sovereignties.

If it does not, and other people are satisfied to follow its spineless policy, the civilized world will accelerate its pace toward a dark age, losing all that has been so hardly won by the same supineness which Demosthenes found in the enervated and decadent Athenians.

To man and nation self-respect is essential for existence, progress, achievement! As a consequence no principle of international law has been more emphatically affirmed as basic and essential. Without it there could be no sovereignty—no national integrity—no insistence upon that sort of obedience to the law of the community which originally produced coherence, and dignifies the mandates of states.

Every force follows the line of least resistance. It is much easier for a belligerent to work through thousands of emissaries in countries whose factories are turning out the munitions and war supplies which arm, feed, and clothe their enemy, than to battle with the same enemy after it is made terrible

by the purchase of these commodities. Therefore the American people in perfect proportion to their commercial and industrial activity can assume that the war now waging in Europe will be transferred within their own borders if they permit matters to drift, and this too while the offending Power or Powers are elaborating diplomatic notes which protest friendship and amity.

For a country situated as is the United States (and the latter is chosen as an example for all neutrals whose industries are similar), there are two courses either of which it may follow as a result of such internal attacks as are above referred to, if it does not care to declare public war, a step which might easily be justified if foreign governments were shown to be responsible for the injuries suffered. One —to inanely fuss and fume over the periodical destruction of factory and storehouse with their contents—the other—to visit such terrible punishment upon the individuals who have dared to make private war upon it as will lead them to think twice before placing

themselves outside the pale of organized society.

If the two paths thus suggested lead far apart, it only emphasizes the necessity of a correct choice. It is therefore to be greatly regretted that many pacificists mistake inaction and temporizing as more desirable than a swift calling to account, and thus imperil the neutrality of their country by the same counsels with which they make ultimate and continuing peace impracticable.

The surest means toward the achievement of world peace and national peace is the maintenance of neutrality and the popularizing among other peoples of those principles which neutrals are bound to see recognized as a matter of self-interest. But if there is any one thing which statesmen and philosophers are agreed upon it is the quite self-evident proposition that neutrality must be effective, assertive, and ready to fight if it is to have any recognition by belligerents. It is therefore incumbent upon advocates of peace to heartily indorse a vigorous neutral

policy, if they wish to see the working out of ends they have at heart.

Let us suppose that the sometime upholders of a policy of non-resistance see this, and withdraw opposition to the sort of rough handling of malefactors that a strong government will naturally adopt, or that the majority of the people are determined in spite of the cavilings of a minority to stop the destruction of their industrial machinery and its products. What can they do?

1. Publish and distribute broadcast so that he who runs may read such statutes and adjudications as form part of the body of state law and justify legal action by the Department of Justice, and such Executive proclamations and manifestoes as have been called forth by the default of both citizens and resident aliens;

2. Proceed against malefactors who owe allegiance to the Government with or without the warning above suggested, and with absolute disregard for the fact that such persons were born under a different flag, and may

have higher, if mistaken, motives, than those of the ordinary criminal whose regard for himself generally outweighs his loyalty to any sovereignty.

If the act committed is plainly treason or misprision of treason, every neutral nation will be found to be provided with ample machinery to handle the situation. If not, the developments of the present European war, following hard upon the re-distribution of the peoples of the earth by immigration, will have the effect of stimulating such self-preservative legislation as has been neglected heretofore, and make good any existing deficiency.

If the act be one that lacks the stronger features of the least excusable of all crimes, but is still deserving of punishment, no government, if not already armed with suitable authority, can well defer providing such statutory enactment as will meet the conditions. This was well understood by the Congress of the United States in 1799 when, with less occasion for action, it passed the

following law adapted to the requirements of that hour:

"SECT. 5335—Every citizen of the United States," etc., "who without the permission or authority of the Government directly or indirectly commences or carries on any verbal or written correspondence or intercourse with any foreign government or any officer or agent thereof," etc., "in relation to any disputes or controversies with the United States, or to *defeat the measures of the Government* of the United States and every person being a citizen of or resident within the United States and not duly authorized who counsels, advises or assists in any such correspondence," "shall be punished," etc.

1799 was the year of George Washington's death. Since that period the world has evolved a thousand new problems for the United States, but none greater than that which has to do with the maintenance of neutrality at times when a large part of its population because of their foreign birth are greatly interested in the success of one or another of the countries at war.

If the nation needed a statute of the character indicated more than one hundred years ago, it requires something far more comprehensive to-day.

It is a curious fact that this and other similar laws, which appear in the Compiled Statutes of the United States were aimed at Tories or disloyal Copperheads, while the sort of legislation now demanded is required to meet the plots of the same sort of recreants, as those with whom former generations dealt but who pose to-day under the name of hyphenated Americans.

While the principal feature making the above classes akin is disloyalty—the object sought by the culprits at present is notably different from that which was aimed at in past periods and is significant. Aforetime it was the endeavor of these malcontents to sap the belligerent strength of the government. To-day the effort is aimed at its neutrality, and a suitable maintenance of correct relations with belligerents.

Nothing can more clearly illustrate the

point which has been made in earlier chapters, that neutrality is far from being synonymous with any status that suggests weakness or debility. A neutrality that does not connotate preparedness and virility is not only useless, as far as the maintenance of peaceful relations is concerned, but is frequently more dangerous than frank belligerency.

3. Besides providing for ample notification and requiring obedience from its own people, a sovereign state which intends to make its neutrality respected must in the third place frankly and fearlessly address itself to the labor of holding in check the alien residents in its borders who show an inclination to conspire against its interests.

The task should not be as difficult as many imagine. While the foreigner to be dealt with may at first appear to be better characterized by the Latin word *inimicus*, which denoted a private enemy, than by the word *hostis* or public enemy, and therefore not within the reach of statutory enactments which provide for the expulsion and regula-

tion of the subjects of a state with whom the aggrieved nation is at war, adjudications and statements by learned authorities are not lacking which indicate that the citizens of a country which is making preparation for war or threatening hostilities, may be treated as if war were already declared. This is set out in Section 4067 of the Compiled Statutes of the United States, which, besides giving the President wide powers, recites:

Where "there is a declared war between the United States and any foreign government *or any invasion or predatory incursion is perpetrated, attempted or threatened* against the territory of the United States by any foreign" government, "and the President makes public proclamation of the event," "all subjects," etc., "of the hostile nation," etc., "in the United States shall be liable to be "apprehended, restrained, secured and removed as alien enemies."

Five years ago the interpretation of such a statute would have been different than that which should be given it to-day. Then the

world clung to standards that had been gradually evolved as the nations, after shaking off the cloak of barbarism, worked out a system of relations based on good faith. To the minds of the epoch preceding the great war that is now impoverishing the world—"preparations for commencing hostilities or invasion," meant acts that were in the open and unmistakable. Charges and counter-charges since August, 1914, and evidence that cannot be shaken of secret plans worked out in our country for the extinction or demoralization of other sovereign states have shown the danger of relying upon such an understanding.

The moment that a government is satisfied by the reports of its agents that plans are under way for its undoing it should consider itself as at liberty to act.

CHAPTER XXV

A NEW PROBLEM: ALIENS AND HYPHENATED CITIZENS IN NEUTRAL STATES

IT has been seen how difficult resident aliens may make it for a neutral to guard its own rights. More and more does he threaten by embarrassing acts and influences to embroil people who offer him hospitality in the wars that are racking other states. It is difficult enough to play the rôle of a neutral, far harder than to enact the part of a belligerent. In the latter case forces are unleashed that aforetime were restrained by law and precept. Simple, primitive hate works its ends upon the enemy without much restriction, and non-combatants excuse much to berserker rage. In the former the neutral is not only expected to maintain with absolute correctness all customary relations with the

nations at feud, but to assume many grievous responsibilities which are thrust upon it. Unenviable as is the lot of a people that desires to maintain an impartial attitude toward nations that have drawn the sword, the hyphenated citizen, alien at heart and in heart-allegiance, and the plain unvarnished alien, a less objectionable character, threaten to provide pitfalls that the wisest ministry cannot avoid.

That this has not always been so is explained by the fact that the alien as such, ensconced in neutral territory, has only recently thrust himself upon the world's attention. Up to the period of the Russo-Turkish war immigration for purposes of bettering one's condition by temporarily abiding in foreign lands, was unfashionable. Removal to countries near at hand would be without purpose, because economic conditions therein were no better than those which existed at home, and a voyage across seas for transient residence elsewhere took too much time and money to make it practicable.

People who huddled into the uncomfortable steamships of those days were possessed by a dread which made them hate and fear the governments to which they were subject, or by a yearning ambition to better the condition of themselves and their children by permanent settlement under favorable auspices. In direct proportion to their numbers therefore, they were imbued with a spirit which made them welcome to newer countries, whose founders had anticipated their dreams, and they readily became bone of the best bone in the land which adopted them. Subsequent wars being minor in character or else waged between peoples who had not emigrated in such numbers and to such neutral centers as to much affect relations, gave no hint that cheap and quick transportation was already seriously affecting the relations of sovereign states, because of the enormous increase of the emigrant wave moving toward the West. It was obvious that some countries were being depopulated —that sections of other lands were becoming

congested, and that knotty problems in civics were the result—but few expressed apprehension as to the bearing these abnormal conditions would have upon a war status, and world hostilities now raging were far developed before the first note of alarm was uttered, or any one appreciated the necessity of enacting legislation to guard against resulting complications.

This has now fittingly become the task of the United States—first—because it has chosen to be the refuge of more migratory peoples than any other land—second—from its notable position as the champion of neutrality—and third—because it has formed the habit of accepting and solving world puzzles that affect humanity without warning or preparation.

It is unfortunate in this case that there is little to build upon but general principles and nothing in the way of precedents.

It is also unhappily true that the American public as such are hopelessly ignorant of the situation that is developing.

Prior to August, 1914, the average citizen knew that in single years a million and a quarter of foreigners, for the most part non-English speaking, were entering the country. He was also dimly conscious that the immigrant tide was swelling because of economic conditions, and the elimination of obstacles that had discouraged travel.

Beyond that point he did not go. Here and there voices were raised in warning because the authorities failed to work out any proper plan for regulating and handling these immense masses between which and the resident population of the country there was little in common. Other voices, however, and these far more numerous and authoritative, were eloquently depicting the virtues of isolated newcomers, elaborating the theory of the melting-pot, and drawing somewhat fantastic pictures of a new nation which if not "conceived in liberty," would arrive at such a oneness of thought and ambition as to make the state omnipotent and bring in the millennium.

It cannot be gainsaid therefore that outside of school-teachers who chafed at the miserable appropriations accorded them for the instruction of these people, and far-sighted manufacturers who had sufficient intelligence to note the revolutionary disposition of the leadership which has secured control of unskilled labor, there has been a disposition on the part of the body politic as a whole to accept the theory of the optimists and to drift.

What is to be done to overcome this inertia before something more positive and satisfactory than opportunist measures can be framed and enacted?

The only answer that readily occurs, if it once be allowed that inaction is dangerous and that Congress does not appreciate the fact sufficiently to pass required laws, is one that urges a publicity campaign to thoroughly arouse the people whose votes make and unmake legislatures. Such a campaign can be initiated by the Administration in power, by groups of informed

patriots, or by individuals who have facts and figures at their command. It makes little difference in a Democracy where every citizen is a sovereign who introduces the movement.

The main point is this: that if it be not undertaken, and adequate legislation is impossible without it, then the United States is sure to fail in its duty as a neutral—

First—*to its own citizens*, who desire to shun war.

Second—to the belligerent governments who are injuriously affected by the action of enemy mobs or persons living under a neutral flag.

Third—to other neutrals.

It is from a conviction that no issue now before the United States and neutral nations similarly situated, outweighs one which has to do with the regulation of the members of foreign colonies—that this and a former chapter have been inserted in a brief treatise upon the Rights and Duties of Neutrals.

Meanwhile, inasmuch as the matter thus

referred to is probably for the first time brought to the attention of those interested in the Law of Nations as one deeply affecting the maintenance of neutrality, it seems prudent to attach the following facts and figures:

The six states, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania appear, from figures purporting to be copied from the Thirteenth United States Census, to have contained in or about the year 1910— 99,171 factories, or more than one third of all such establishments in the United States. These represented at that time a capital of $8,593,809,000, or nearly one half of the whole amount of money set apart for manufacturing purposes. The same states, which are contiguous to each other along the Atlantic seaboard, contained in the said year approximately 23,339,674 people of whom 6,383,993, or more than one fourth were foreign-born.

When it is remembered that masses of the latter were so distinctly foreign as to be ignorant of English, and that no reference is

made to the millions upon millions who confess a foreign parentage and are themselves foreign at heart, or to the millions of non-English speaking foreigners who have entered this section since 1910, it must graphically appear to the least thoughtful that the situation may well become embarrassing.

Let us suppose that foreign states which are at war, and whose subjects many of these people are, see fit to refuse such accommodation as the United States, strictly within its rights, requires, or to dare its resentment—and that the enemy of the above nations also represented by millions of subjects resident in America, insist that if the United States fails to act, it will be a breach of neutrality.

The American people themselves may be right-minded and high-minded. The Administration in Washington may be far-sighted and vigorous, but the position of both people and Executive must in any case remain difficult and dubious because of the

sentiment of the foreign colonies, and any action must be taken at risks which need not be recited here, until such time as suitable regulative legislation is enacted.

CHAPTER XXVI

EMBARGO

THE turmoil in Europe which appears to be increasing rather than lessening as these pages go to press, has seriously affected neutrals and is ominous in its threatenings of further complications. Already Belgium, Italy, Bulgaria, Turkey, and Portugal are involved as partisans in the forceful solution of issues which prior to the initial acts of the war, did not seem to concern them, and other countries are finding it difficult to preserve their neutrality.

What nation will be the next? While events indicate Powers which are nearest to the war maelstrom, juxtaposition is by no means the only condition which may hasten the answer. Across the Atlantic great trading neutral states have been suffering an

interference with cardinal rights that is not only humiliating but expensive. It is not probable that any of them will act from sordid motives, however costly their experiences, but it is quite possible and desirable for them to use that sort of firmness in pressing representations and protests which alone makes neutrality respectable. Inasmuch as hostilities may easily succeed the most diplomatic of ministerial demands, it follows that commercial states which are most distant from the seat of war may become partisan quite as early as those whose territories and political concerns are particularly affected by the issues of the hour.

It is this fact that makes it equally desirable for all neutral states which are reluctant to throw down or accept the gauge of battle, to study means and measures which fall short of war but can be used to vindicate the dignity of a sovereignty. Of these Embargo is the most important, although given a subsidiary place by most international lawyers.

Hostile Embargo is defined by Hall as a form of reprisal which consists in the seizure of ships of the offending state at sea or of any property within the state, whether public or private, which is not intrusted to the public faith. Hall further says that Embargo is sequestration, and that vessels subjected to it are not condemned so long as abnormal conditions exist that caused its imposition. If peace is confirmed—they are released—if war breaks out they become liable to confiscation.

For the purpose of bringing the matter to the reader's attention, it is proper to note that this author is apparently in accord with Wheaton and others who suggest that if hostilities follow the original seizure, the act is to be considered as one of war from the beginning—*hostili animo ab initio.* While the latter quote Sir Walter Scott (see the *Boedus Lust,* Rob. Adm. Rep., v., 246), their conclusions are seriously questioned, and with good reason, by Oppenheim. No sufficient argument is introduced to show why an

act which was not intended to be war, automatically becomes so by some future event, and it is very evident that the acceptance of any such theory which affects property interests in a vital manner might lead nations to declare war when they would far prefer to first try out coercive measures that were moderate in comparison. It would also discourage neutrals from acting when their interests required them so to do.

With this passing reference to a subsidiary matter which, wrongly understood, may readily deprive the doctrine of hostile embargo of its value, we are in a position to discuss the worth of the latter to neutrals, bearing in mind a great author's assertion that by reprisal "all acts otherwise illegal are made legal"—a statement which becomes particularly true when applied to embargo when used as a protest by non-combatants who only seek to recoup themselves for injuries suffered at the hands of belligerents.

If hostile embargo is useful to nations at war, it must be doubly so to those at peace:

1. Because in the former case it is only one of many means to an end—in the latter it presents to the neutral the most effective instrument, if not the sole one that can be used to accomplish its purpose;

2. Because the belligerent, although it may hesitate to acknowledge it, is more dependent upon the neutral than the neutral is upon the belligerent.

The very fact that a nation is engaged in war causes the people of states not thus involved to withdraw from other intercourse with the combatant than such as has to do with the sort of trade that tempts their cupidity. Obliged to adapt themselves to conditions, they become more or less self-reliant and independent. Should an embargo be laid upon their neutral vessels or possessions by the belligerent, it is doubtful if other property will be secured than that of venturesome neutral citizens. The neutral nation will be affected, but not seriously so.

Consider the status of a belligerent under like circumstances. Such of its possessions

as were in neutral hands at the beginning of the war have remained there—others have been added to avoid the danger of having them seized in case of enemy conquest. It needs the use of neutral harbors to provision and refit its ships, and such commodities and supplies as the neutral is free to furnish. The proclamation of an embargo not only embarrasses its relations with the neutral, but may cause it to lose strategic points of value in its relations to the enemy.

While the above facts should not only lead a belligerent to carefully refrain from the sort of embargo that is initiated on the plea of necessity, an excuse which Hautefeuille rightly rejects with impatience, and should also have the effect of causing it to avoid trying neutral patience, they ought to strengthen the hands of the neutral Power that is not too weak to resist invasion. There is belligerent money in its banks, belligerent supplies on its docks, or moving thereto, interned ships, war vessels in its ports, and mayhap merchantmen moving in the waters

that it dominates. These all are nothing more than hostages for belligerent good behavior and reasonable conduct.

A self-respecting state, provided it is prepared to defend itself in case of military operations against it (and no neutral that really wishes to maintain peaceful relations can afford to be otherwise), is thus in a position not only to insist upon comity and good faith on the part of the belligerent, but to perform its duties toward its own people, toward the enemy of the offending belligerent, and toward the community of civilized states. Such is the weapon of hostile embargo with which circumstances not infrequently arm neutrals. If non-combatants are to have more consideration in the future than in the past, it will be used with telling effect.

Should it happen however that the neutral state is not prepared to go to this length, there is another form of embargo, viz., Civil Embargo, that is not unfamiliar to the American people who used it in 1807. This is defined by Richard Henry Dana in his

notes to Wheaton as the "Act of a government detaining the ships of its own people in port." As Mr. Dana has pointed out, a civil embargo amounts in practice to a nation's interdiction of commerce—"for it would usually be accompanied with a closing of its ports to foreign vessels"; and the distinguished commentator adds that "if the motive for this interdiction is simply municipal, and not in the way of reprisals or hostility to foreign Powers, it has claims to be acquiesced in by them."

While a civil embargo that is purely negative in its attitude toward foreign governments, and therefore less objectionable, to them, might become serviceable to a neutral state that lacked a grievance, it is not the sort that we now have in mind in discussing the usable measures which a neutral Power can use to vindicate its sovereignty. This should be clearly by way of reprisal, being distinguished from hostile embargo by avoiding the seizure of foreign possessions and making itself felt through the embarrass-

ment caused the belligerent at whom it is aimed.

The fact that it has a retroactive effect upon the people of the government by whom it is adopted and also may readily bring about unforeseen complications unless wisely planned, should by no means render it as impracticable as it was made to appear by Jefferson's unfortunate experiment during the first decade of the last century. "My principle," said that President, "is that the conveniences of our citizens shall yield reasonably" "to the importance of giving the present experiment so fair a trial that on future occasions our legislators may know with certainty how far they may count on it as an engine for national purposes."

While the words are fair and the disposition of the Executive was good, it is unfortunately true that the act was so wholesale in its character and unhappy in its results as not only to lead to the early substitution of the non-intercourse act of 1809, but to destroy its value as a precedent unless it is to serve

as a warning against careless legislation. It is for this purpose that it has been given attention.

No advocate of forceful measures for the maintenance of a self-respecting and respected neutrality is prepared to recommend the adoption by neutrals of plans and policies which will in any way unfavorably affect their own population. Meantime it must be recognized that, short of war, there are but few expedients that they can use to advantage to command the attention of a polite but unscrupulous belligerent. It behooves them, therefore, in time of stress to make close study of the various features which characterize the civil embargo. Modified and shaped to meet existing conditions, it may on occasion put a neutral state in a far more favorable position in its relation with belligerents than it could otherwise hope to secure.

CHAPTER XXVII

DUTIES AS DEFINED BY PROCLAMATION

THE fact that the foregoing chapters have abridged reference to that part of the Positive Law of Nations which affects neutrals, in order to discuss principles and policies, makes it not undesirable that some space should be given before closing to the sort of specific injunctions which should be given a neutral people by its government in time of war.

These are admirably epitomized in the proclamation of neutrality made by the President of the United States at the outbreak of war between Italy and Austro-Hungary (which purports to be a duplicate of the several proclamations issued by the Executive as state after state became embroiled in the existing hostilities), and are unquestionably

the result of more than a century of administrative endeavor to make the American people neutral in fact as well as in word.

To understand the full significance of this official communication it will be well, before giving it careful examination, to recall:

1. That the United States is the greatest of neutrals, and that its services to the cause have been of enduring value, and are so recognized.

2. That it was George Washington who inaugurated measures to insure the neutrality of a disinterested state by a proclamation in 1793 which instructed proper officers to institute proceedings "against all persons who shall within the cognizance of the courts of the United States violate the law of nations with respect to the Powers at war or any of them."

3. That the United States, as Oppenheim does not hesitate to state in his great work on International Law, "was the most prominent and influential factor" in advancing the

rights of neutrals by its attitude toward neutrality from 1793 to 1818.

4. That it was the Congress of the United States that passed the first foreign enlistment act which codified former and important enactments in 1818, an example that was followed by Great Britain, which passed a similar measure in the succeeding year.

5. That the decisions of the United States Courts, many of which are briefly digested by Dana in his copious notes on Wheaton (p. 534 *et seq.*), have brought into the body of international law factors of inestimable value to neutrals.

With such introduction, which will suggest to the student the different steps which the American people have taken in evolving the law which is now on their statute books or understood by their Executive to express their will, and without repeating the preamble of President Wilson's proclamation, we propose:

I. To quote *verbatim* that part which is statutory and immediately introductory thereto; and

II. To add a brief abstract of further injunctions contained therein.

I. I, Woodrow Wilson, President of the United States of America . . . do hereby declare and proclaim that by certain provisions of the act approved on the 4th day of March A.D. 1909, commonly known as the "Penal Code of the United States," the following acts are forbidden to be done, under severe penalties, within the territory and jurisdiction of the United States, to wit:

1. Accepting and exercising a commission to serve either of the said belligerents by land or by sea against the other belligerent.

2. Enlisting or entering into the service of either of the said belligerents as a soldier, or as a marine or seaman on board of any vessel of war, letter of marque, or privateer.

3. Hiring or retaining another person to enlist or enter himself in the service of either of the said belligerents as a soldier, or as a marine or seaman on board of any vessel of war, letter of marque, or privateer.

4. Hiring another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted as aforesaid.

5. Hiring another person to go beyond the limits of the United States with intent to be entered into service as aforesaid.

6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.

7. Retaining another person to go beyond the limits of the United States with intent to be entered into service as aforesaid. (But the said act is not to be construed to extend to a citizen or subject of either belligerent who, being transiently within the United States, shall, on board of any vessel of war, which, at the time of its arrival within the United States, was fitted and equipped as such vessel of war, enlist or enter himself or hire or retain another subject or citizen of the same belligerent, who is transiently within the United States, to enlist or enter himself to serve such belligerent on board such vessel of war, if the United States shall then be at peace with such belligerent.)

8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents.

9. Issuing or delivering a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

10. Increasing or augmenting, or procuring

to be increased or augmented, or knowingly being concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of either of the said belligerents or belonging to the subjects of either, by adding to the number of guns of such vessels, or by changing those on board of her for guns of a larger caliber, or by the addition thereto of any equipment solely applicable to war.

11. Beginning or setting on foot or providing or preparing the means for any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents.

The above recitation from the Penal Code is followed by orders and instructions:—

II. *Prohibiting* use of waters of the United States by armed belligerent vessels for the purpose of preparing for hostile operations, or as posts of observation upon the enemy.

Specifically forbidding any belligerent ship of war to make use of a port or waters of the

United States for a war station, or to secure facilities; or to leave any harbor or waters of the United States from which an enemy vessel shall have previously departed until twenty-four hours thereafter.

Requiring any belligerent warship that enters United States waters after the time when notification takes effect, to depart within twenty-four hours, except in case of stress of weather or need of supplies or repair, in which case the authorities are to require departure after necessary supplies are received or repairs finished, arrangements being made however that such a ship shall not depart (as before provided) within twenty-four hours after an enemy ship has cleared, and that if there are several vessels of opposing belligerents in given waters at the same time, provision shall be made for alternate departure; and

Providing that such supplies as are above referred to shall only be of sufficient provisions, etc., as are requisite for the subsistence of the crew, and so much coal as will

take the ship to the nearest port of her own country, or, if she carry sail, half the amount of coal necessary for that purpose. Also that such a ship shall not return to the waters of the United States again within three months without permission, unless she has first entered a port of the government to which she belongs.

The proclamation further calls attention to the fact that the treaties and statutes of the United States and international law enjoin all persons in the territory of the United States to obey its laws—warns all citizens and residents in the United States that while expressions of sympathy are not restricted, they must not originate or organize military forces in aid of a belligerent —and that while they may, without restriction, manufacture and sell munitions and contraband, they cannot carry such articles on the high seas for the use or service of a belligerent, nor convey belligerent soldiers, nor attempt to break a blockade, without

incurring the risk of hostile capture and penalties.

While this state document testifies to the vigilance of the United States Government in endeavoring to perform its obligations toward belligerents, its main features are incorporated in these pages because they are so admirably qualified to instruct citizens in regard to their personal status as the subjects of a neutral country. Meantime we cannot forbear from remarking that if anything has been overlooked in this endeavor to impress upon the people of the United States the duty they owe to themselves and to other nations, it has been rather in the methods adopted to provide for its circulation than in the matter contained.

As has been pointed out in recent chapters, an unfortunate proportion of the population of the country are ignorant of the English language and only receive such part of governmental communications as their racial leaders choose to place in their hands. The very importance of the proclamation should

therefore bring home to the reader whose attention is called to this matter the necessity of providing for the printing of such publications in various languages in order that they may have the effect upon our heterogeneous public that is desired by the President.

CHAPTER XXVIII

SOME CONCLUDING OBSERVATIONS

INTERNATIONAL law is looked upon from two points of view: that of the community of civilized states; that of the single state with its selfish interests very much in mind.

As a consequence it has been framed and interpreted when framed so as to square with the theory or plan that best suited the convenience of those to be affected by it. That is why its historic aspect is so marvelously bewildering to the student, who finds it, when peace encourages commercial relations between nations, assuming the dignity of a science; but when the gates of Janus are open, denied by the men who teach it in the universities, except as a dead thing that has been.

In closing a discussion which has had to do not only with matters immediately affecting the United States, but with principles which underlie the well-being of human society, it is fitting to call attention to these facts in order that we may better prepare ourselves to meet further problems. In due course we have considered the doctrines of blockade and contraband, questions dealing with the freedom of the seas, and measures and conditions calculated to affect favorably or unfavorably the future of our own people. It will not be surprising if, in so doing, we have been impressed anew with the truth that neutral rights automatically receive recognition when the interests of the race are uppermost, and that neutral duties are emphasized at times when specific nations control the center of the stage; or—to put it differently—that neutrals gain ground when their point of view, which is generally that of the community of states, commands attention, and lose when it is difficult for them to secure a hearing. Should this be the

case, let us hope that it will not encourage pessimism or skepticism, on the ground that the crystallized wisdom of the past, as expressed in international law, is something worthless.

There is surely no adequate reason why it should do so. First, because no one has ever claimed that the law of nations had reached its ultimate form, and second, because everyone has been and is perfectly conversant with the fact that it is little more than a codification of various compromises. As a matter of fact a frank appreciation of conditions ought to have a stimulating effect and lead to constructive effort. It is a great thing to know what is the matter with past plans that have not carried, and perils that must be guarded against in future building. To the proper spirit, the consciousness of having known that some lines of past endeavor could not and ought not to succeed because of inherent weakness, can be no handicap to new effort. Failures of this nature corroborate the correctness of a sane judgment.

Why should it be otherwise with the student of international affairs who sincerely desires the ultimate enthronement of law? He has been perfectly conscious that international law was arbitrary, illogical, and founded on wrong premises; that the point of view of the individual state, rather than that of the sisterhood of nations, in normal times and relations, had shaped existing rules and customs. At the same time he has not been ignorant of that economic ethical law—the natural law of Grotius—which, recognized or unrecognized, is always dominant and controlling. Should he not therefore welcome an upheaval, like that which is tossing about the present generation, as a cleansing fan which will sweep away much litter, and clear the way for some honest building?

All that is now happening was strangely enough foretold by William Edward Hall (a name held in high reverence by international lawyers), August, 1889, in a preface to his work on the Law of Nations. After noting that recent centuries had indicated a resur-

gence of law succeeding the apparent breaking down of restraint in great conflicts, this eminent observer points out that something exceptional in the matter of wars may well be anticipated by his contemporaries, in which "questions of half a century will be given all their answers at once," and adds the following impressive sentences which may well be borne in mind by those who have faith in the ultimate triumph of law:

"If the next war is unscrupulously waged it will also be followed by a reaction toward the strengthening of law:"

"It is a matter of experience that times when International Law has been disregarded have been followed by periods in which the European conscience has done penance."

We have said that international law is looked upon from two points of view. May it now be added, with the expectation that the individualist will agree, that no law of nations is of any value whatever unless the point of view of the single state is subordinated to that of the sisterhood of nations? To

those who regard all outside of the borders of their native land as "barbarians," this statement may seem absurd, and there will be those who will feel much the same way although they are far from being exclusive, and are only properly patriotic.

However this may be, is there any way of escape? Our fathers recognized the individual man as free and the arbiter of his own fortunes, but could find no way of securing to him his rights without establishing a government of laws. It is emphatically the same way with the nations. Each constituent factor in the Society of States is jealous of its independence and impatient of dictation. Notwithstanding this fact it is absolutely dependent upon a reign of law if it is to be protected from the aggression of others and to maintain those privileges which it claims. To secure such conditions it must voluntarily surrender something of its own will to the expressed dictation of its peers which are none less than sovereign states themselves.

It is because this has not been done in the

past that the law of nations has proved so unsatisfactory in a crisis. Where municipal law, while protecting each citizen, has hedged him about so that the conduct of his affairs has been somewhat modified by the normal requirements of the public; international law has permitted individual states either as belligerents, or as historic nations with a record for belligerency, to dictate to all other sovereignties either through unnatural rules and customs or with the "mailed fist." One does not have to be wise in philosophy or affairs to realize how insufficient and unreasonable is such a code—nor how impossible when the welfare of neutral Powers is at stake.

In so far, then, as the law of nations has heretofore contained in itself that which was flagrantly bad and unstable is there not cause for genuine rejoicing because its fallacies have been exposed and because many of its arbitrary creations have been wrecked? Such exposure and destruction will be found to have left unscorched rules

founded on eternal principles, however temporarily flouted and mishandled by the unscrupulous. Sometimes more is accomplished by tearing down that which is injurious, than in erecting that which is weakly good. Aside from the positive betterment of conditions that comes about with the correction of error, the occasion gives an opportunity for the construction of something stable and permanent.

Shall we not hope that the close of the present conflict in Europe will find the United States:

1. Reconciled to the breaking down of principles not founded upon the law of nations.

2. Insistent that a corrected and purified international law shall safeguard the normal relations of states.

3. Prepared, so that with the next great conflict it can forcefully prevent the breach of laws which directly or indirectly affect its welfare.

To Hautefeuille, whose frequent references

to the primary law must be justified in these days when nations have had to fall back on fundamentals, the last duty and right—*devoir et droit*—of neutrals lies in an unflinching resistance to every belligerent aggression, and in a *Preparedness* that will make such resistance effective.

During the present war the United States has perhaps properly confined itself to representations and protestations. These are well enough in their place, but international law will never assume the position which belongs to it, nor non-belligerent nations secure their rights, until neutrals are themselves prepared single-handed or in company to join battle in vindication of principles to which they are committed.

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